In the Supreme Court of the United States.

DECEMBER TERM, 1875.

No. 772.

WM. H. GAINES and others

vs.

THE UNITED STATES.

Brief and Argument.

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Statement of Case.

When the act of 29th May, 1830, granting pre-emption rights was passed, Ludovicus Belding was in possession of the south-west quarter of section 33, township 2 south, range 19 west, in the then Territory of Arkansas, having removed to it in the month of February, 1828, from the State of Ohio, settled upon it and cultivated in 1829. The land was unreserved, unappropriated and unsurveyed, nor was the latter effected till in May, 1838. In the month of March, 1839, proof of Belding's claim to pre-empt the quarter section was made and the purchase money tendered by his family, he being then dead. The Perciful claim under the act of 1814, and the Langlois claim under the New Madrid act of 1815, having been already presented to the district officers, and being older in date, action on that of Belding was suspended. Nor had definite action been taken on any of the claims when, in May, 1850, the Commissioner called the attention of the Secretary of the Interior to them, and he, on the 12th of October following, ordered them all re-referred to the district officers for full investigation and report of *the facts*, reserving for the department the decision of all questions of law. On the 23d, that reference was made by the Commissioner with full instructions and the different parties entered upon

proofs, in taking which, cross-examinations were had by the opposing claimants. The investigation consumed many months, was conducted before the register and receiver, and hotly contested. They reported—as to the Perciful claim—the register adversely, because of *a failure of proof* as to inhabitancy and cultivation required by the act of 1814. The receiver reported favorably, saying the inhabitancy and cultivation were proven, and Perciful's heirs were thereby entitled under the act of 1814, (Record, p. 562.) They concurred in reporting in the Belding case that the *facts* of *possession on the 29th of May*, 1830, and of *cultivation in* 1829 *by Belding were fully proven*,—but the receiver, (in the face of the instructions,) raised a question of law, holding that Belding's tenancy and culture should enure to the benefit of Perciful, not Belding. The Commissioner rejected the Perciful claim, held that the register's decision was the correct one and in favor of Belding's heirs, (Record, pp. 548, 549, 550, 551.) On the 21st of November, 1851, the application of Belding's heirs for permission to enter having been refused by the Commissioner and taken to the Secretary of the Interior by appeal, that officer, "after consultation with the Attorney-General and full consideration," decided in favor of their claim, and ordered the Commissioner to instruct the district officers to permit them to enter. This was done, the purchase money duly paid, and the *receipt and certificate, No.* 6545, duly delivered to them, (Record, pp. 551–2–3–4 & 5.) The appellants brought suit v. The United States in the Court of Claims, under the act May, 1870; that Court decided adversely and they bring the cause here by appeal.

Assignment of Errors.

1. The Court of Claims erred in hearing testimony from the opposing claimants in reference to the *facts* on which the Belding entry was founded.

This matter was heard before the land officers on a regular trial by proofs between the different claimants. The adjudication of the facts by the land officers is conclusive!

2. No one was impleaded with appellants but the United States—their answer does not raise such issue of fact. The testimony was *dehors* the issue before the Court and

should not have been noticed. Instead of that the Court went into an original examination as though Belding's heirs were for the first time applying to that Court for permission to make the entry allowed them by the proper officers, a quarter of a century ago, and not impeached by the Government! This was gross error.

3. That Court also erred in construing the acts of Congress of 29 May, 1830, April 20 and July 14, 1832, as applicable to this cause and under them declaring the entry of appellants to be *void*.

4. The Court erred in holding and decreeing the appellants are without equity against the United States, and in dismissing their petition. The decree should have held the sale binding, and the United States trustee of the legal title to the land in controversy for appellants.

Brief and Argument.

The Perciful and Langlois Claims.

The first cannot be sustained as a substantive claim against the Government for many reasons; as a derivative title, it will be hereafter noticed:

1. The proof of inhabitancy and cultivation, as required by the act of 1814, was not made to the satisfaction of the register as required by the act. (Record pp. 141, 142, 143, 144 and 145, Registers Report.)

2. The title of the Quapaw Indians had not then been extinguished, and no rights of pre-emption could legally attach. The treaty by which the Indian title was extinguished, was made and ratified years afterwards.

3. The case of Hale v. Gaines, 22 Howard, is an extinguisher in any aspect of the claim.

The second claim is founded on the New Madrid act of 1815. The construction of that act has been settled by the Attorney-General, the Departments, and this Court for nearly half a century: that construction is fatal to the claim, and has been too long held to be a law of property to be now disturbed. The attempt now to make the Conway survey available, is an after thought, forced by the decision in 22 Howard. This Court, however, held in that case that the Conway survey was merely a private one, and no rights could be based upon it. At any rate, the land

claimed was not subject to entry in 1815, and the New Madrid act only extended to land *then* subject to entry as this Court has uniformly decided.

In the division of labors in this cause, the duty of proving these claims valueless has devolved on others, leaving to me the special duty of showing that

The Belding Entry is valid.

Before entering upon the discussion of the main questions arising, it is requisite to notice certain objections urged against the entry in this cause, lest they prejudice the rights of appellants.

1. The annotations made by the district officers of certain matters which the commissioner wished thus preserved are supposed in some mysterious way, not very intelligible to modify, and take this out of the category of "ordinary entries." Such annotations are by no means uncommon, but in no instance where they have been made has this Court on that account hesitated to receive the certificate as conclusive, that a certain portion of public land mentioned in it had been bought and paid for. An instance of the kind came before the Court in Lytle v. The State, 9 How., and doubtless others will readily occur. Courts very properly treat these as mere memoranda, not as conditions of the contract affecting the rights of purchasers, or the obligations of the Government.

2. That Belding went on the land under a lease from Perciful. The evidence of this is what perports to be an *admission* of the fact in writing, dated *2nd April*, 1831, with no attesting witness—sworn to in open court *in January*, 1842, (Record, pp. 151-2.) This is not a paper to be registered, and this copy of a copy is not competent evidence. At most it is simply an admission, not a contract—but if the alleged lease was made the absence of the original paper should be accounted for before secondary evidence can be heard—if by parole for a term of years, it is void under the statute of frauds. But this whole matter is a sham. *Perciful had no interest there after the 4th of October*, 1824, *having sold and conveyed to Joseph Paxton.* (Record, p. 559, Deed to Paxton) This point is more fully treated under head of tenancy of Belding's *postea.*

3. That Belding was one of a set of villagers. This is purely fanciful. If others lived on the quarter section, as

they have perferred no pre-emption claim, it is to be presumed Belding alone had *cultivated* and was the only one entitled under the act. The land officers were fully satisfied on this point.

4. That Belding abandoned the possession, and therefore lost his right.

The decisions made in Pennsylvania on this subject are peculiar to that State, and have never been followed by the Federal courts. The act of May 29th, 1830, is very explicit as to the beneficiaries intended, no condition is annexed except occupancy and prior cultivation; and the period of the occupancy is defined as being that of the *date of the act.* The law having made no exception, the court can make none. The court cannot by an arbitrary addition to the statute transform the pre-emption into a prison.

Warfield *vs.* Fox, 53 Penn., 382.
Eucking *vs.* Simmons, 28 Wis., 272.
Lynan *vs.* Walker, 35 Cal., 634.
Harrington *vs.* Smith, 28 Wis., 43.

5. That fraud was practiced by securing the entry on a promise not to ask for a patent. This is founded on the note written to the Commissioner by Mr. Lawrence on the 14th of October, 1851, applying for permission to make the entry, and at most seems but a superfluous expression of purpose to the effect, that with the then opinion of the Secretary in reference to the effect of the reservation act any application of the kind would be nugatory and of course would not be pressed. But if *intended as a fraud* it was a most signal failure, for on the very next day the Commissioner decided against the application. (Record, pp. 570 & 551.) "If fraud was practiced, the Courts of Chancery are open to seek a rescision."

U. States v. Fitzgerald, 13 Peters, last paragraph.

6. That this entry has been annulled, by the suggestion of Hon. Jacob Thompson to the Commissioner, (Record, p. 154,) that "the entry of Belding's heirs should now be cancelled." This was on the *7th of June*, 1860! It certainly would be a wonderful state of the law if the entries and patents issued by the Government and rights acquired under them, could be long afterwards annuled by the *ipse dixit* of new Secretaries! But this suggestion of the Hon. Secretary was never acted upon by the Commissioner, the "entry of Belding's heirs" was *not* "canceled" and it is before the Court wholly unaffected by the *brutum fulmens!*

(Record, 556, Wilson's depo.) In Bank of Metropolis v. U. States, 15 Pet., 400, this Court has said the acts of a predecessor cannot be set aside by an incoming Secretary merely because he differs in opinion.

7. That Belding never set up claim to any pre-emption. He never could set up such a claim for the simple reason that he died in 1833, and never in his lifetime could prove his right to any quarter section, the surveys not having been made. The settled construction of the act by the department and this court is that the right was to a quarter section, and those occupants on fractional quarters of less than 160 acres have been always restricted to the surveyed lines. If the law gave him this right and he was ignorant of it, that was a misfortune not a crime.

8. That Belding claimed pre-emption on the Golfa. This is not true. He never set up such a claim. There is not a scintilla of such proof. Mrs. Belding after his death did in her own right make such a claim *under the act of* 1841. The simple truth is, the facts have been in every conceivable way which ingenuity could suggest attempted to be warped and twisted so as to defeat this claim. But the land officers have uniformly decided that Belding was *in possession* and did *cultivate*, and that concludes the inquiry.

These objections, all of them, are idle triflings with the Court. First. Neither Hale nor Rector are impleaded with the Beldings, and there is *no issue* to be tried with them. Second. If such pleadings were here the Government. by proper proceedings and averments, not one having no prior equity, can take advantage of such irregularities. Hoofnagle v. Anderson, 7 Wheaton, 211; Rector v. Ashley, 6 Wallace, 144. If these parties or either of them have established *prior* equities against the Government that settles all questions. Till that is done they can raise no objections to this entry. Third. The Government makes no such issue—it files no cross-bill—it charges no "fraud, unfairness or mistake of facts." Yet the adverse claimants have been permitted by the Court of Claims to encumber the record with a vast mass of testimony in no way relevant to the issue made by the answer of the United States, the only defendant in this cause! The opinion of the Court of Claims, (Record, pp. 586–7–8,) shows clearly enough how materially this irrelevant matter contributed to prejudice the mind of that Court in deciding

the cause, although their attention was called to the following happy summary of legal principles:

"It is hardly necessary to repeat the axioms in the equity law of proceedure that the allegations and proofs must agree, that *the court* can consider *only what is put in issue by the pleadings*, that averments without proofs and *proofs without averments are alike unavailing*, and that the decree must conform to the scope and object of the prayer and cannot go beyond them. Certainly *without a cross-bill* the Court could not decree against complainant the opposite of the relief asked for in the bill."

Washington R. R. Co. v. Bradley, 10 Wall., 303.

The issue made by the United States is strictly in harmony with the spirit in which Congress consented that the Government might be sued, and *required* these suits to be "conducted and determined according to the principles and practice of equity jurisprudence in the other Courts of the United States." That body did not deprive any of the claimants of a single right, legal or equitable possessed at the passage of the act, and if the appellants have an entry which is not void, they are entitled to all the benefits it can confer.

Unquestionably the certificate in proof is possessed of every requisite of form and substance to render it on its face valid. It was issued by the proper officer; identifies the land and the purchasers; shows the sale and payment of the purchase money; its fairness is in no way brought in question, and before *the Court* can disregard its obligatory force, it must be demonstrated conclusively to have been issued by officers who had no legal right to hear and decide the questions arising upon the claim; in other words, mere usurpers of authority not belonging to them. With their *errors of judgment* in matters ligitimately belonging to the discharge of their official duties, the Courts have no concern. The long list of cases from Marbury v. Madison down, in which this Court has steadily maintained the sacredness of this principle need not be cited. It is the settled doctrine of the Court. Speaking of this very entry, this Court said:

"The action of the officers of the land department with which we are asked to interfere in this case is clearly not of this character (ministerial.) The validity of plaintiffs entry which is involved in their decision is a question which requires the careful consideration and construction of more than one act of Congress. It is far from being a minis-

terial act under any definition given by this Court."
Gaines v. Thompson, 7 Wall., 353.

Congress appointed by the act of May 29, 1830, a tribunal with full power to hear and determine all applications for pre-emption to lands embraced by that act—and by the supplemental act of July 14, 1832, expressly continued their functions in reference to such lands embraced in the former act as were unsurveyed. "The careful consideration and construction" of whatever acts of Congress affecting the subject matter with which they had to deal, was no less a power exercised and a duty imposed upon them, than is the decision of questions of law by any judicial functionary whatever. Such a decision unimpeached for fraud or unfairness, and unappealed from, must, upon principle, be conclusive in the particular case. It may be voidable, but it is not *void.* That constructions and decisions thus given, and acted upon, will be respected by the Courts, is not only plain from the cases above referred to, but others which this and other Courts have decided. The principle came before Chief Justice Marshall, where under the act of Jan. 2, 1813, certain duties were committed to the Secretary of the Treasury, and he construed the law as embracing a case to say the least doubtful,—that eminent jurist said:

"Upon examining the act of Congress, I felt much doubt whether it applied to any case of joint interest between American citizens and British subjects. * * It might well be doubted whether the powers of the Secretary of the Treasury extended to any case where the specific articles are not wholly owned by citizens of the United States. * * The construction put on the act by the department entrusted with the power of remission ought to be respected by the Court. I shall therefore consider it as comprehending this case. * * The legislature seems to have intended that the act of the Treasury Department should be final and conclusive, and that all the facts should be placed before the Secretary before he performs the act. * * The Secretary acts on that statement, and *his acts cannot be revised by the Court.*"

Galligo Richards & Co. v. United States, 1 Brockenborough, Decisions Chief Justice Marshall, 442.

It will doubtless be objected that in the present case the reservation act took this quarter section out of the category of lands "offered for sale by the act of 1830," and that in dealing with it, the land officers transcended the bounda-

ries of their jurisdiction, therefore their whole action is a nullity. But at present we are not inquiring whether the acts of Congress involved received at their hands the exact construction which this Court would place upon them if it was an original question; or, if they had appellate and revisory power over these decisions whenever made. The point of the inquiry is, whether in making the decision, that this entry was proper and legal, the Secretary of the Interior was deciding questions which Congress conferred upon him power to decide.

It is admitted frankly, that ordinarily, all inferior tribunals must act within prescribed limits, and unlike Courts of general jurisdiction, have no power to decide upon the limits of their own jurisdiction. This is true, however, only when that jurisdiction is so defined by the legislature, that the tribunal is left without any call for the exercise of judgment in fixing its limits. A critical examination of the authorities will show that in all cases where the legislation is of such character as to impose the adjudication of this, as well as other questions, the decision upon this point is no less conclusive than upon any other arising in the cause; like the decision of any other Court, it may be reversible, but it is not *void*. The principle upon which this rests, is, that in deciding such question, the judicial function is lawfully called into action.

That in this class of cases the decision is not *void*.

See Greenwalt v. Burrill, 1 Lord Ray., 454.
Vale v. Owen, 19 Barb., 22.
Agnel v. Robbins, 4 Rhode Island, 493.
Evansville R. R. Co. v. Evansville, 15 Ind., 395; and on the general question of validity of the judicial findings of inferior tribunals, a very instructive, learned and able opinion of Judge Cowan, People v. Collins, 19 Wend., 56.

"Sometimes certain facts are required to be proven to a Court of limited jurisdiction as a ground for issuing process; in such case, the tribunal must necessarily judge for itself upon the sufficiency of the proof offered. If there be any evidence, though slight and inconsiderable, having a legal tendency to prove the necessary facts, the proceedings will be held valid until the action of the Court is set aside by some direct proceeding."

Freeman on judgments; Sect. 522, and authorities cited.

To same effect are the following:

"If the inferior Court has passed upon the jurisdictional facts, and found them sufficient, the parties and their privies are estopped in collateral actions to litigate the matter again."

Bigelow on Estoppels, 142.
Sheldon v. Wright, 5 New York, 497.
Dickman v. New York, 5 ib., 434.

Should it be desirable to examine the proof, it will be found to be ample, (Record pp. 521, 523–'4, and 527 to 548 inclusive.)

"Where a statute assumes jurisdiction to exist, and makes explicit provision for the mode of its exercise, that is sufficient to create jurisdiction."

State v. Miller, 28 Wis., 634.

"Where discretion is vested in officers, their decision cannot be reviewed by the Courts."

Hargraves v. Smith, 3 B. and S., 611; Wilcox v. Jackson, 13 Peters.

The same principle runs through a great variety of cases, which will readily occur to memory; such as findings of commissioners to whom disputed matters of account in dealings with the Government have been referred; of boards of arbitrators appointed by this, with foreign governments to act upon claims for damages; where heads of department have been authorized to investigate and decide upon claims of different sorts and the like. In all such cases, unimpeached for fraud, unfairness or mistake of facts, it is believed this Court has uniformly held the decisions binding, both upon Government and parties. Certainly, where in good faith such a decision has been acted upon, the money paid on one side and accepted on the other, whatever might be thought of the wisdom of the decision, no Court *ex mero motu*, could say nobody is bound by it!

"It is well settled that when the jurisdiction of a Court of limited and special jurisdiction appears on the face of its proceedings, its action cannot be collaterally attached for mere error or irregularity. The jurisdiction appearing the same presumption of law, arises that it was rightly exercised, as prevails with reference to the action of a Court of superior and general authority."

Comstock v. Crawford, 3 Wall, 403.

Indeed the principle here contended for is within the case of Johnson v. Towsley, 10 Wall. There the line of demarkation is fixed correctly that the decision fairly made and upon facts within the limits of jurisdiction is valid, and that only after the title has passed from the Government, will equity, without questioning the validity of the judgment, apply to the relation of the parties the established doctrine of implied trusts.

Warren v. Van Brunt, 19 Wall, reaffirms the doctrine.

The question then is, did Congress by the peculiar legislation here, make it incumbent upon the tribunal to which they confided the duties of hearing and determining pre-emption claims, to *un*surveyed land embraced in the act of 1830, directly call into action the [illegible] of that tribunal to decide whether or [illegible] *subsequent* to that act was intended to [illegible] made under it? They were told to decid[illegible] upon the *same conditions in every respect* [illegible] this condition was not in existence when [illegible] passed. It really does not seem to be deb[illegible] or not this question was legitimately examined and decided; it lay right across their path of duty, placed there by Congress. Is its decision void? When under orders following it the money was paid in good faith; the certificate given; the transaction closed, and brought here by authority of Congress, and without its fairness questioned in the pleadings, is that whole matter a nullity; if so, what is the use of legally constituted tribunals to hear, decide and transact business? The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever this power is called into action.

Grignon's Lessee v. Astor, 2 How., 338.
3 Pet., 305; 12 Pet., 718, and 623.

But there is another ground why, according to the requirement of Congress in the act, under which this suit is brought, to wit: that the cause shall be determined upon the principles of equity jurisprudence—this transaction cannot be treated as a nullity. If it be admitted that the Secretary, and Attorney General Crittenden by whose advice he acted, did not place upon the acts involved the correct construction, and that strictly the sale was originally not binding, (which are *not* admitted,) yet it by no means follows that this as a Court of equity can hold appellants have

no equity. That by the Constitution the whole power of disposition of the public lands is confided to Congress, will not be questioned. That Congress also had both the power to confer the judicial authority, to hear and determine applications for pre-emptions, and the ministerial to complete the sales by receiving and receipting for the purchase money, and issuing patent certificates, will also be admitted; that all such sales within the authority thus given are binding, is equally plain. The principle lying at the foundation is that Congress has over the whole matter all the powers of general agents of Government, and when they see proper, instead of directly permitting entries, receiving payment and issuing certificates, may clothe other officers with these functions who act in place of Congress. Now in a case coming before them suppose upon a strict construction of the Statutes applicable these officers honestly misconstrue their authority, holding the pre-emption right to have been ~~confined to a question~~ which was not embraced, sell it, receive the money on account of the Government, and issue a patent certificate for it. In such a case could not Congress confirm the sale? It is presumed no one will doubt this, for they have all power over the matter. But that body has also equal power over the purchase money! Suppose under a law passed by Congress requiring all money received, on account of sales of public lands, to be covered into the treasury, the receiver in such a case declines to pay over this with other moneys in his hands, how long would this Court listen to his arguments about mistaken construction of Statutes, or that this money was "a mere private deposit" in his hands? Would he not be compelled to pay it over as public money? Suppose it paid into the treasury and Congress by act orders it appropriated and used by the Government as public money; this is done and never paid back to the purchaser—nor any lawful step taken to rescind the contract thus made with him. When he brings his certificate before the court sitting in equity, and the Government files no cross bill, asks no relief, nor tenders back this purchase money; is such a suitor without equity? Upon what principle of equity can the Government be heard to say the Secretary of Interior mistook his authority? Suppose he did, was not Congress authorized to sell the lands—when the Secretary sold it did not Congress on Government behalf have a right to acquiesce in it, order the money paid into the treasury and be used for Government benefit? Has not

Government through its own Congress enjoyed the whole fruits of this trade, and now proposing no sort of restitution, asking no rescision, nor impeaching the trade for unfairness, fraud or mistake of facts, seeks no relief, yet keeps the money.

Certainly, if this was a matter between individuals, this Court would not tolerate argument. Is the Government bound by what Congress does? Like a corporation it can act only through agents, yet it is capable of contracting and being contracted with—of buying, selling, and incurring obligations. Does it do these things under rules of law, acquiring its rights and incurring its obligations by virtue of law, or does it stand apart as a huge despotism. Upon principle it seems to be plain, that the ordinary rules of law control in business transactions of the Government like those of individuals or corporations. Nor are we without authority on the point. Sedgewick, after remarking that the deference shewn in England for the rights of *the Crown* has never been a recognized principle of law in this country, says, nor do I understand why the Government should be exempted from the operation of general laws.

Stats. and Const. Law, 107, 2d ed.

Here, however, are decisions directly in point:

"The question is whether the State is bound by its agents as a natural person acting through agents is bound? The truth is, a government can act only through its agents, and all its officers, executive, legislative, judicial and ministerial, are merely its agents. That it is not bound by the acts of its agents, is *to deny* its capacity to create an obligation. But this will be denied by no one."

State v. Jeff. Turnpike Co. et al., 3 Hump., 311.

"We are aware of no principle upon which this case can be exempted from the general rule *pervading every system of jurisprudence*, that the act of the general agent, or one put in the place of another to transact all his business of a particular character, if within the general scope of his authority, will bind his principal. This rule, we think, in a case like the present equally applicable to public agents or the various public functionaries which the Government may employ to transact its ordinary business and operations as to private agents employed by private individuals."

State v. Hamilton, 11 Humph., 49.

So this Court: "But where the State claims title under

the deed or other solemn acts of third persons, it takes it *cum onere* and subject to all estoppels running with the title and estate, in the same way as other privies in estate."

Carver v. Jackson, 4 Pet., 87.

The doctrine is applied in the following cases:

Commonwealth v. André, 3 Pickering, 224.
Penrose v. Griffith, 4 Binn., 231.
Nisto v. Carpenter, 7 Cal., 527.
Mayer v. Hallet, 22 Ala., 697.

"On a title by estoppel an action of ejectment may be sustained."

Stoddard v. Chambers, 2 Howard, 317.

It is settled equity law that whenever and however property is sold, and the purchase money is appropriated by the owner, he will not be listened to if he questions the validity of the trade. It is natural justice, no less than equity law, that he shall make restitution, or if he does not propose to do this, and ask a rescision, the trade shall bind him.

Story on Agency, § 250.
Glynn v. Baker, 13 East., 510.
Taylor v. Green, 8 S. C. & P., 316.
Benedict v. Smith, 10 Page, 127.
Farmers Loan Co. v. Walworth, 1 Com., N. York.
Whitwell v. Warner, 5 Wash., 450.

One of the guarantees of the Constitution to the citizens of our Government is, that private property shall not be taken or appropriated for public uses without adequate compensation. On no principle of known law can Government take advantage of Congress doing that indirectly which they could not directly do. That body could have sold this land to the parties without the intervention of the Interior Department, and when the latter sold it and received the money for it as a purchase, and Congress afterwards ordered it paid as public money into the Treasury, this was a literal "taking," and in the light of equity law is precisely the same thing as if they had originally made the sale and accepted the price. This Court is bound to take judicial notice of the public acts of Congress, and the books are full of them ordering all officers who had received money on account of the Government to cover it into the Treasury, and afterwards appropriating it.

There is no pretence that Secretary Stuart entered into a corrupt conspiracy to defraud the Government, or that

the money was not paid to the proper officer, or that appellants fraudulently procured Congress to order it covered into the Treasury and afterwards used on account of the Government. The plain truth is, the Government through Congress got and used this money, has never offered to repay it, does not now propose to do so, asks no rescision of the contract,—and when now asked for the title to property, the price of which it has retained for a quarter of a century, it gravely throws up its hands and says: "My Secretary of Interior made a mistake!" The true equity law is thus succinctly stated: "It would be highly inequitable and unjust to permit a defendant to repudiate a contract the fruits of which he retains."

Steam Nav. Co. v. Wood, 17 Barb., 378.
Chester Glass Co. v. Dewey, 16 Mass., 94.
Palmer v. Lawrence, 3 Sand., S. C., 162.
McCutchin v. Steamboat Co., 13 Penn. R., 13.
5 Hill, 490; 11 Barb., 213.

The case of Farris v. Coon, 40 Cal., 50, at first blush looks like an adverse ruling to the position here assumed, but on examination will be found not to be so. There a land warrant issued under an act of the legislature, was sold, and located on land not subject to be thus entered. The State claimed the land, and was held not to be estopped by having received the money for the warrants. The Court places its decisions not on the ground that Government is not bound by law in its business transactions, but because the act of the legislature provided, 1st, that the warrants could be located *only* on land belonging to the United States; 2d, that in the event a warrant was located on land not subject to be thus entered the holder was not bound by it, *but might float his entry and locate it on other land belonging to the United States.* In the light of this statutory contract, of course, there was no estoppel by the mere mistake of the holder of the warrant in locating it. Say the Court, "the State is under no legal or moral obligation either to return the money or refrain from claiming the land. She never agreed expressly or by implication to do one or the other—and equitable estoppels are founded solely on the theory that to permit the party to maintain the right he asserts would operate as a legal fraud." But in the case at bar the land was sold, the price accepted and used, and appellants are entitled to have the title assured to them.

Surely the highest considerations of enlightened patriotism demand that a Government like ours, resting on the respect and affections of its people, should never by judicial decree, be placed in the position of a licensed wrongdoer; nor will the law itself long maintain its claims to being a science, if its principles lose their stability, and shift in their practical application to facts with the mere change of parties litigant before the Courts. In the present case, however, the act under which this suit is brought, *requires* the enforcement of the principles of equity jurisprudence between the appellants and the United States, and the principle here contended for is one of the most sacred character in the whole equity system. The whole responsibility rests on Congress, which had a perfect right to bind the Government.

There are other reasons why this entry should not, in the issue before the Court, be treated as a nullity. It has already stood the test of judicial scrutiny and been sustained. In Rector v. Gaines, 16 Ark., and Haile v. Gaines, 19 do., a Court composed of able judges, perfectly familiar with land law, sustained its validity. It has also been before this Court, where it was open to every objection arising on the Statutes, and the Court refused to pronounce it *void*. The action was ejectment under a Statute of Arkansas, founded upon the entry; if void, it could not of course sustain that action; yet the Court affirmed the decision of the Supreme Court of Arkansas in favor of plaintiffs. It is true the Court refused to *declare* it binding on the Government, assigning the reasons: 1st, That under the judiciary act they had not jurisdiction for such a purpose; and 2d, *That the decision might be against the Government in a case in which it was no party*. Pregnant words these! Haile v. Gaines, 22 How. If the entry was *void*, it could not sustain the action of ejectment on the well known principle that plaintiff in that action recovers solely on the strength of his own title. In Wilcox v. Jackson, a similar suit with similar decision below, was brought here under the same judiciary act; yet the entry was declared void, and the case reversed on that sole ground. In the case of the present entry, though that of Wilcox v. Jackson was a precedent, the action was sustained and the decision below affirmed. The teaching of these two cases is unmistakable, and in the present issue, this entry cannot consistently be pronounced *void*. It is no more impeached in this than in the 22d Howard case; for

here the United States acquiesce in its perfect fairness, and pray no relief against the contract.

The settled doctrine of this Court is that entries when made are to be sustained whenever this can be done by any reasonable construction. In Marshall v. Currin, Ch. J. Marshall said: "Courts are inclined to sustain entries, and will adopt all reasonable constructions to do so;" 4 Cranch, 172. The same doctrine runs through Massie v. Watts, 6 Cranch, 148; Matson v. Hord, 1 Wheat., 130, and Shipp v. Miller, 2 Wheat., 316. In the latter case, Judge Story, delivering the unanimous opinion of the Court, says: "The general leaning of Courts has been to sustain entries when it could be done by any reasonable construction."

There never was an entry permitted after a more patient and critical examination of the facts upon which it was predicated than was this. Not only was it especially referred by the department to the district officers, Record, 551, but the adverse claimants arrayed every possible feature of testimony in opposition to it. As the record (*passim*) shows no effort was spared to defeat the claim, yet with the witnesses before them so that they could better judge than can any court from merely reading the printed testimony, both the register and receiver agreed in finding the *facts* of possession on the 29th of May, 1830, and of cultivation by Belding the year previous, to have been proven, Record, 548–9. And this finding was approved by the Commissioner.* How can the adverse parties or the Government be now heard to call these facts in question? On what principle did the Court of Claims, on the present issue, undertake to try over again the whole question of fact as if Belding's heirs had an original application before them praying to be permitted to enter the land? How could a court justly judge of the *rights* of a party who has been thus gravely permitted to enter, paid his money and received his patent certificate, which ignores the findings, and transactions based thereon, of the only department to which Congress has confided the investigation, and goes back to the testimony of adverse claimants taken before those officers, and reverse their decision when Government does not attack it? Some of the testimony was in fact taken since these suits were instituted. Surely such dealing with the official acts of a co-ordinate depart-

* This was a full compliance with the requirements of the law. These officers were entrusted with the power to hear and decide, and the only requisite was that they be fairly satisfied by the proof.

ment of the Government is not in harmony with sound legal principle. On the other hand the decisions of this Court quoted above shew that the true conservative instincts of an enlightened judiciary lead to sustaining rather than uprooting official transactions after they are had. The necessity for this is obvious. It involves a principle lying at the foundation of much of the property of our people—of the quiet of families and the security of homes. Did the Courts abandon it, a half glance can see that society itself would soon be unhinged. No Court knows better than this the importance of fixed legal principles. In the case at bar the facts were fully investigated, decided, and the finding acted upon; they are not put in issue by the pleadings; the Government does not question them, nor allege any fraud, unfairness or mistake, and it is obvious the only office such proof can be hoped to have here will be to obscure the true *judicial vision* and pervert the administration of the law. The attention of the Court is called to *the issue* before them (Record, p. 78) that the mass of irrelevant testimony in the record may be disregarded. Nor was there ever a case where the head of a department more gravely pondered the law. When this case came first before Secretary Stuart he thought the reservation act fatal to the claim—in this respect, agreeing with the Commissioner; but subsequently, on the 21st Nov., 1851, after consulting Attorney-General Crittenden, decided it would be proper to permit the entry. (Record, 551.) It is asserted he did not change his opinion as to the true construction of the acts involved. On what ground? If he still believed the reservation fatal to the claim how could the entry be held to be "proper?" It is evident Attorney-General Crittenden entertained a different opinion, and convinced Secretary Stuart of his error; for he says: "After consulting the Attorney-General, and full consideration . . . *I have concluded it would be proper*," &c. The Commissioner accepted it as an official "decision."

See Butterfield's letter, Record 551–2, last clause.

It is childsplay to talk about this not being a decision, or the entry not having all the legal force "of any ordinary entry." "The wish is father to the thought." It would not be more silly in a case where this Court gave judgment for a thousand dollars in favor of a party, to say the judges, at the same time, did not "adjudge" the party entitled to it!

The effect of entries, when permitted, is well settled:

"The certificate of the Register of the Land Office is of as high a nature as a patent itself." Jennings v. Whitaker, 4 Mon., 50; Scam., 344. "So it has been held in the United States Courts, that when land has been bought and paid for, a certificate to that effect makes it as much the land of the purchaser as the patent itself. When bought and paid for, the Government holds the mere legal title for the land in trust for the purchaser." Goodlet v. Smithson, 5 Porter, 243; Western v. Smith, 13 Cal., 419; Washb. real prop., 178. "When the land was bought and paid for, it was no longer the land of the United States, but of the purchaser; he held for it a final certificate which could no more be canceled than a patent." Carroll v. Safford, 3 How., 460. "The register and receiver, to whom the law primarily confides those duties, often hear the application of a party to enter land as a pre-emptor or otherwise, decide in favor of his right, receive his money, and give him a final certificate that he is entitled to a patent. Unquestionably this constitutes a vested right, and it can only be divested according to law." Johnson v. Towsley, 13 Wall., 85. The entry before the Court is unimpeached by the Government, except on a naked question of law, and we have seen (both the fact and the reason for it) that this Court will adopt all reasonable constructions to sustain entries.

The point has been made that the Government cannot now question this sale; but this aside, if reasonable constructions are allowed to control, it is believed to be as demonstrable as a mathematical proposition, that the construction evidently placed upon the acts of Congress by Attorney-General Crittenden, leading the Secretary to permit this entry, was in strict accordance with sound law. The Belding claim is founded upon the acts of 29th May, 1830, 4 Stat., 420, and 14th July, 1832, Ib. 603. The question is one of

Statutory Construction.

The early legislation of Congress was exceedingly favorable to pre-emption claims, and the decisions of this Court no less so; in consequence of which the idea became prevalent that an occupant living upon the public lands acquired under the pre-emption law, by the mere force of his inhabitancy and cultivation, a vested right of which he could not lawfully be deprived. Frisbee v. Whitney, the case of a person claiming a pre-emption by virtue of conduct, the most violent, scandalous and selfish, and who

had never paid any money for the land, was well adapted to try the truth of this theory, which, on being critically considered, was overthrown. This decision has been followed by the Yosemite Valley case, in which the Court take pains to show the language used upon this subject; especially that of Lytle v. The State, had received a construction which was not intended. Taking these cases as the point of departure it is frankly admitted that Congress has the *power*, if that body desires to do so, to destroy pre-emption rights at any time before the settler by proof and tender of the purchase money has acquired a vested right in the land.

The question however as to what Congress *can* do, and that as to what it *has* done in a given case is essentially different, and to the latter inquiry as applicable to the present cause, is this argument addressed.

Act of 29 *May*, 1830.

To understand the case fully this act must be briefly examined.

The pre-emption policy having been tested by partial laws became a favorite with both Congress and the people, and in this act was for the first time made general, applying to *all* the public lands not excluded by the act. The lands were to be entered only in quarter sections, and therefore the public surveys were a prerequisite before its entire policy could be made effectual. The land officers to whom was entrusted its execution construed it to embrace *un*surveyed lands regarding the surveys as not essential to the right, but their want as a simple impediment to its enjoyment. Whatever doubt which might have been entertained as to the soundness of this construction was soon dissipated by the direct and explanatory legislation of Congress as will be more fully shown hereafter. The act was also temporary, expiring by limitation in one year. In the light of the *intention* as subsequently shown, this act was most imperfectly drawn, and unquestionably by its expiration and lack of proper provisions in relation to the unsurveyed lands, would have practically defeated one branch of this general policy. This, as will be demonstrated, Congress did not intend to permit in any respect. But our first inquiry is what effect did the act of 1830 have upon the land embraced in its provisions? In the Yosemite Valley case this Court said, "In the case from Arkansas, the act of 1830 authorized the entry and sale of the land," "it opened the land for sale."

In an earlier case, the decision of which turned upon the construction of the act, the Court construing it said, "The act of the 29th of May, 1830, to grant pre-emption rights to settlers on public lands *appropriated* this quarter section on which Etheridge was then settled to his claim under the act for one year, subject to be defeated by his failure to comply with its provisions. During that time this quarter section was not liable to any other claim or to be sold to any other person except at public sale under the proclamation of the President, and that Etheridge had a right to prevent by paying for the land as provided by the act. * In the case before the Court *all the land* in the S. W. quarter of the fractional Section *had been appropriated by law to satisfy Etheridge's claim.*" Brown's Lessee v. Clemments, 3 How., 666. An "appropriation" is defined to be "the setting apart the thing for some particular purpose." Wilcox v. Jackson, 13 Peters, 512. This construction of the act is unquestionably sound in principle, in harmony with all the earlier decisions, and that of those to whom the execution of this law was confided. "Great regard ought in constructing a statute to be paid to the construction which the sages of the law who lived about the time or soon after its passage put upon it; because *they* were best able to judge of the *intention* of the makers. It is moreover a maxim that *contemporanea expositio est fortissima in lege.*" 2 Inst., 11, 136, 181. "The construction given to an act of the legislature soon after it passage, cannot be altered at a very distant day." Graham's Appeal, 1 Dall., 136. It is therefore assumed to be absolutely certain that with the facts found in his favor by the land department as here, if the land had been surveyed in 1830, and Belding had been permitted to enter it, such entry would have been unquestionably valid. It is equally clear that the only difficulty was the want of the public surveys, a matter beyond the occupant's power of control. Nor was the land surveyed by the Government till the act had expired. In this condition of things the reservation was made, and the question is, was the right of pre-emption destroyed? If Congress *so intended*, of course this is decisive, if not, not. It resolves itself into a question of legislative intention, and this, is to be ascertained by the application of the common law rules for construing statutes. Rice v. Railroad Co., 1 Black., 358. That the terms of the reservation act are broad enough to destroy any pre-emption right in the four sections, is frankly admitted. That such must have been the legal effect of that act under

the well known rule of construction, "That where the language used is in itself unambiguous there is no room for construction, and the legislature must be taken to mean just what they say," had Congress not at a *subsequent* time passed *another act* involving this claim and the land, would be equally plain. We must therefore examine this latter legislation and see whether, under settled rules, it sheds any light upon *the intention* of Congress in passing the reservation act, and the sense in which *they designed it to be understood* in connection with the pre-emption policy of the act of 1830.

"Where the law is plain and unambiguous whether it be expressed in general or limited terms, the legislature should be taken to mean what they have plainly expressed, and consequently no room is left for construction. But if from a view of the whole law, or from other laws in *pari materia*, the evident intention is different from the literal import of the terms employed in a particular part of the law, that intention should prevail, for that in fact is the will of the legislature."

United States v. Fisher, 2 Cranch, 386.

"The general words of one clause in a statute may be restrained by the particular words in a *subsequent* clause of the same statute."

Rex v. Archbishop of Armagh, 8 Mod., 8.
Atty. Genl. v. Governor of Chelsea Works, Fitz., 195.

Act of July 14, 1832.

Before proceeding to the analysis and construction of this act, it is proper to note that on two different occasions this entry has been referred to the Attorney General for advice, once with the other two, to Atty. Genl. Cushing, (6 Opinions,) and again to Atty. Genl. Bates, (10 Opinions.) It is a remarkable feature, in both of these opinions, that neither of the distinguished gentlemen have discussed the above act. How or why this is we are not informed. It could not have been for want of notice that the act was directly involved, for Sec. Stuart's decision is, that the entry be permitted "under the acts of 29th May, 1830, *and* 14th July, 1832." Nor can any sound lawyer examine the validity of this entry without seeing that, as an original question of strict law, the solution turns directly upon the force and effect of the latter act. But for its passage, the

claim would have been lost beyond controversy! Attorney Genl. Cushing expressly declines "to examine the legal merits of the Belding pre-emption," contents himself with regretting that the entry had been permitted, and restores his cheerfulness by laughing at the claimants litigating over property to which neither had a patent! whilst Atty. Genl. Bates seems to have forgotten that Congress had ever passed the act of July 14. However valuable the opinions may be in reference to the points really examined, it is obvious that they cannot enlighten the Court in the construction of these acts.

This is a remedial act passed for the purpose of better securing the rights and policy of pre-emption in the act of 1830, itself a remedial Statute. There is, therefore, a two-fold reason for giving it a most liberal construction. That such acts are to be liberally construed, has been laid down in the strongest terms. "In case of a remedial statute, everything is to be done in advancement of the remedy that can be given, by any construction that can be placed upon it." Dwarris, 654, Stevenson v. Everett, Cowp., 391, Sedgwick, 360, referring to Johnes v. Johnes, 3 Dow., 15, which latter I have not found. But this rule aside the language of the act is so plain, simple and direct, that if its literal terms are not disregarded, no difficulty will be found in sustaining this entry. They are as follows: "That *all the settlers and occupants* upon the public lands of the United States, who are entitled to a pre-emption according to the provisions of the act of Congress, approved the 29*th of Muy*, 1830, and who *have not been*, or may not be, enabled to make proof and enter the same within the time limited in said act, in consequence of the public surveys not having been made and returned, *the said occupants shall be permitted to enter the said lands on the same conditions in every respect as are provided in said act*, within one year *after* the surveys are made." Now this law was made not to confer any *new* right of pre-emption; but to rescue the policy of the act of 1830, from the jeopardy in which previous legislation had left it, and maintain the rights and privileges thereof, unbroken to all occupants interested. This is manifest from many particulars, such as the direct recognition it contains, that *un*surveyed lands were intended to be included in that act; that *all* such claims were in Congressional esteem *valid*, and might be perfected within the year after the lands were surveyed by virtue of that act; by its

endorsement of the *departmental construction* previously placed upon it, that *un*surveyed lands were included; by converting a temporary into a *perpetual* act having no definite time to run; by making the act of July a *reviving* or continuing act, calling back *as to these lands and their occupants, with no exception*, the full force of the expired act; by carefully inserting into the act of July, *retrospective* terms, so that no entry or sale should be defeated because of the expiration; by directly referring to the particular *class of lands*, and fixing in explicit terms "the *same conditions* as are provided in the act of 1830, *in every respect*," as the *sole rule* governing *all* claims based upon it where the land had not been surveyed "in the time limited." It would be difficult to find an act which was better considered, or more carefully prepared, than this seems to have been, to have secured the pre-emption privileges entire in the act of 1830. Congress must be taken to have meant just what they have plainly said, and to have intended every legal effect directly following an enactment free from ambiguity. That such were the effects of the act of July, upon that of May, 1830, is clear, from the authorities: "When a temporary statute is made perpetual, it is to be considered as perpetual from its enactment." Alcock and Napier, 375. "If a statute expire, and is afterward revived in another statute, the law derives its force from *the first.*" Shipman v. Henbest, 4 Term., R. 109. "Upon a cursory examination of the provisions contained in the act of 1838, there does seem to be some difficulty in applying them to the facts of this case; but when it is remembered that it is an enabling act, being expressly amendatory of the act of 1828, the difficulty vanishes under the well established rule, that the original statute and the amendment are to be received as one act, and that no portion of either is to be deemed inoperative if they can be made to stand together without wresting the words from their appropriate meaning."

Harrell v. Harrell, 8 Florida, 50.

"When a statute revives another, it is revived in that precise form, and with that effect it had the moment it expired." Cargo Brig Aurora v. United States, 7 Cranch, 382. It may be remarked, that in reviving the expired act of 1830, the usual effect of revivors, namely, to call the former into operation, *prospectively* from

its date was expressly guarded against by Congress in making the act of July *retrospective in terms*. This Court has, however, judicially settled its construction in harmony with its provisions in this respect. Lytle v. The State, 9 How., 333, and Marks v. Dickson, 20 How., 501. In the former case Judge Catron delivered a dissenting opinion, the point of which was, that the act of 14th July, was "a new pre-emption law;" but the Court held otherwise, and that eminent jurist acquiesced in this ruling in subsequent cases. It is, therefore, insisted, that on the 14th of July, 1832, the whole policy of the act of May 29, 1830, in reference to pre-emption claims to *un*surveyed lands under it, was recognized by Congress as then in force, and provision made by law for their entry and sale within a year after the surveys, on the same conditions as are provided in that act, *in every respect*." That is what the law says in clear language. Does it mean what it says? There are those who say not; because on the 20th of April preceding this law, Congress had reserved four sections embracing this land from sale, entry, or appropriation, for the future disposal of Congress. The argument is, that therefore, in July following, Congress did not mean what they said. Was Congress in the last act legislating on a subject within its control? Are these acts repugnant in their provisions? Does the act of April say the land shall not be entered and sold; if so, does not the act of July say, *this*, as much as any other quarter section, *shall* be sold to the occupant? The act makes *no exception* whatever of occupant or land; on the other hand, it says *all* of them—"*the said occupants shall be permitted to enter said lands*." In the act itself, no sort of distinction is made between the quarter sections or the conditions of sale; it is the last utterance of Congress on the subject, and if an exception is put there, it must be imported and incorporated by others. This is legislating, and Courts cannot lawfully do that.

Extreme cases test principles. Suppose when the act of July 14 was passed, there had lived on each quarter of the four sections reserved an occupant, entitled to pre-emption under the act of 1830, and no other occupant of unsurveyed land any where else who was entitled. Would the act of July be a dead letter? By what rule? Was not the effect of the reservation, taking it in its harshest sense merely to leave the land as it found it, public land belonging to the United States? The legal status was that of

absolute subjection to the will of Congress after that reservation as before it. Was there any legal barrier in the way of Congress to prevent the repeal or the modification, or the explanation of the reservation by a subsequent law? Could they not recognize rights previously conferred and direct their enforcement? When the idea of a reservation gets into some minds it seems to carry with it a conviction that there is *but one way possible for Congress to deal with it for any legal purpose whatever.* Such views of course lead to unsound conclusions. Courts know that if two acts are in direct and irreconcileable conflict the last is the law. Now these acts of 20 April and 14 July, as far as pre-emption rights under the acts of 1830 in these four sections are concurred, are in *apparent* conflict. A simple inspection of their terms will show this. If in the opinion of the Court one or the other must give way in the strict sense of repeals, is it needful to quote authorities to shew that the *last* is the repealing act. Sir William Blackstone says it is "a principle of universal law that *leges posteriores priores contrarias abrogant.*" 1 Book Com. In Davis v. Fairbairn this Court enforced the principle as a partial repeal, 3 How., 645. The same principle is recognized in U. S. v. Tynen, 11 Wall., 88, and other cases will readily occur to the Court.

"Where a later act prescribes in terms the only rule by which the matter is to be decided though not strictly repugnant or inconsistent with a former law, the latter operates as a repeal so far."

Sacramento v. Bird, 15 Cal., 294.
Swann v. Buck, 40 Miss., 268.
Weeks v. Wolcott, 15 Gray, 54.
People v. Syttle, 1 Idaho, 161.

But I must be candid. This point is only suggested, not pressed. The doctrine of implied repeals is not favored by the law, and though in a case where the terms of two acts are unambiguous and plainly regugnant it *is* sound law that the subsequent act repeals the former, yet unless the legislation is of such character as to require the cause to be decided on this narrow and distasteful ground, it is in harmony with principle that some other solution be sought. It is also best for the administration of pure law by the courts; the effort to escape the operation of so distasteful a doctrine, having in some cases been carried so far as practically to make the *first* a repeal of the *last* act to the extent

of the repugnancy! This is done by a simple artistic use of words: thus, "the first statute created an exception; the last was evidently not intended to operate on that;" this too, right in the face of the plainest words of the last enactment! The attempt to solve the construction of these acts only in the light of the doctrine of repeals has heretofore misled more than one mind, and believing it is not necessarily involved I frankly say so. If the act of July undertook to *confer new rights*; if it was "a *new pre-emption law*," as Judge Catron called it, then the question here would be narrowed down to the inquiry whether by implication it repealed the reservation act, or was intended to be a disposal of the land within the meaning of that act; but it is not such a law, *it gives no new rights*. After passing, a reservation affecting by its terms a favorite public policy, founded as this Court has said "upon a *national feeling as shewn by the course of legislation for many years*," the same Congress comes to legislate upon the direct subject of these pre-emptions, and reaching back behind this reservation recognizes in terms every claim to unsurveyed land, and declares *as the law* the continuation of that policy in *every respect* just as it was before this reservation existed! Now then, in what sense did they wish this reservation to be understood in its connection with the pre-emption policy of 1830? If we consult the reservation act *alone* they intended to destroy it in these four sections; but if we take what they afterward said in reference to that policy and sales to occupants under it, they did *not intend* the reservation act to be taken so broadly. What do they say in this legislation? Is not this the true meaning? "As to all unsurveyed lands subject to pre-emption under the act of 1830, we wish the privileges therein accorded carried out in every case where the occupant has not had an opportunity to buy for want of the surveys; but as to all other claims these four sections are reserved for the exclusive disposition of Congress." We have seen that a subsequent provision will modify a prior law, and such is the effect here. Any one conversant of the then general opinion and feeling in reference to pre-emption rights, when once accorded by Congress, will not be astonished at finding that body coming promptly up to the rescue of any such rights jeopardized by their own apparent neglect or attack.

We can readily see why Congress might wish to reserve this land against new rights to be acquired at a future time, yet might not wish to take away and destroy pre-emption

rights already conferred. There is an essential difference between a determination not to give, and that of taking away what had been accorded. Such rights once conferred were *then* most certainly regarded as sacred; the sentiment is traceable in the legislative, judicial and popular history of the times, and to the student it would be a startling surprize to find such a step taken by a Congress of that day as *designedly* to deprive some settlers of their preemption rights and take the most careful pains to preserve those of others conferred by the self same act. It is legitimate to consult the temper of the times in ascertaining the intention.

"The general state of opinion, public, judicial, and legislative, at the time of the enactment, may be considered in ascertaining the intention."

Keyport St. Co. v. Farmers Transportation Co., 3 C. E. Green, 13.
Delaplaine v. Crenshaw, 15 Gratt., 457.

There are some exceedingly sensible and pertinent, though quaint sentences, in an old law book, which I quote. Speaking of cases within the equity of statutes, this language is used: "In order to form a right judgment, whether a case be within the equity of a statute, it is a good way to suppose the law-maker present, and that you have asked him this question: Did you intend to comprehend this case? Then you must give yourself such answer as you imagine, he being an upright and reasonable man would have given." Eyston v. Studd, Plowd., 467. Suppose the question asked of that Congress which passed the act of July: Did you *intend* by this act to embrace *every settler and occupant on unsurveyed land entitled by the act of* 1830; *or did you intend to make exceptions of any of them?* I can imagine but one answer—and I know nothing more satisfactory *than the words of the act.* Congress when questioned might well point to the act, and say, there you will find the *land*, the *occupant*, and the *conditions* in every respect—*we have said so plainly and unmistakably—follow the act.*

But we need not conjecture or guess; we have positive authority which solves the question. These acts were passed at the same session. In such cases, the latter act has been holden for this reason, to be *in explanation* of the meaning of the first. Speaking of certain acts where the doctrine of implied repeals had been enforced, Heath, J,

said: "In those cases the Statutes by which the former were held to be repealed, were passed in the subsequent sessions. Where both statutes are passed in the same session, *the latter is only explanatory.*" The King v. Brady, 1 Bos. and Pul., 189. "*Latter words describing the remedy, imply a restriction on those which preceed them.*" Adams v. Woods, 2 Cranch, 381. It has been held in New York and elsewhere, that "statutes passed at the same session of the legislature are within the reason of the rule governing the construction of statutes in *pari materia.*" Smith v. People, 47 New York, 339. So in Indiana State v. Buckley, 2 Blackf., Indiana, 250. But both the reservation act and that of July 14, embrace this quarter section of land; and, thus, for a two-fold reason are in *pari materia.*" This Court has laid down the correct and decisive rule governing this case. In construing a law, statutes in *pari materia*, should be taken into consideration; and *if it can be gathered from a subsequent statute in pari materia what meaning the legislature attached to a former law, this will amount to a legislative declaration of its meaning, and should govern its construction.*"

United States v. Freeman, 3 How., 556.
Morris v. Miller, 6 Barn and A., 454.

"An explanatory statute being a legislative construction of the words used in a former statute ought to be strictly adhered to."

Inhabts. of Dalbury v. Foston, Salk. 534, Carth., 396.

If these authorities are followed, and the rules thus given frankly applied, *the very terms of the last act* will be preserved, its requirements carried out, and the sense in which Congress intended the present terms of the reservation, be applied. Thus the reservation will not only be prevented from overthrowing a policy back of it which Congress subsequently took pains carefully to preserve; but it will also be prevented from accomplishing practically an outrage upon all correct principle by plunging with all the force of a partial repeal right through the very words of a statute not in existence when it was passed! Any other construction than that contended for, will come just to this, word it as we may. Has any Court the right to disregard the plain and unequivocal words—so plain as to exclude all necessity for construction—of an act passed by Congress over a subject within their exclu-

sive power to control? The fact that Congress had previously enacted a Statute which looks like something else was their wish, is, or should be utterly powerless to induce a Court to disregard the plain and explicit words of the same Congress directly upon the point promulgated in a subsequent law. "Every act of Parliament is made either for the purpose of making a change in the law, or for the purpose of better declaring the law; and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment." Dean of Ely v. Bliss, 5 Beavan, 374. What is the fundamental rule lying at the foundation of the enforcement of all law, and directly settling the question whether the law-making power or the Courts are to make laws? An old authority says: "A statute ought, upon the whole to be so construed, that if it can be prevented, no clause, sentence or word, shall be superfluous, void or insignificant." Rex v. Burchett, Hard. 344, 1 How., 108. So a later says: "The best rule to arrive at the meaning and intention of the law, is to abide by the words which the law-maker has used." United States v. Bright, C. C. Penn. Dis. Acct., 1809, Pamph., 188. Reg v. Inhab. St. Edmunds, Salisbury, 2 Q. B., 72; Brown v. Millen, 7 Mees. and Well, 196; Crisp v. Banbury, 8 Bing., 394; H. Rep., 632; Rex v. Lumsdale, 10 Ad. and Ellis, 160; Rex v. Tooly, 3 Term R., 69; Welsford v. Todd, 8 East., 580. "I do not know how to get rid of the words of this section of the act of Parliament, and where the legislature in a very modern act of parliament have used words of plain and definite import, it is very dangerous to put upon them a construction the effect of which will be to hold that the legislature did *not mean that which they have expressed.*" The King v. Inhabts. Stoke Dam, 7 Barn and Cress., 563; 6 Ib., 712; 8 Ib., 99.

Lord Denman: "We are bound to give to the words of the legislature all possible meaning which is consistent with the clear language used; but if we find language used, which is incapable of meaning, we cannot supply one. It is extremely probable that the alteration suggested would express what the legislature meant; but on *looking at the words as judges*, we are no more justified to introduce that meaning, than we should if we added any other provision." Green v. Wood, 7 Q. B., 178, 185, Coleridge J. "If I thought the construction we are adopting put any force on the act, I should be the last to concur in it; for the longer

I sit here, the more I feel the importance of seeking only the meaning of a statute according to a fair interpretation of its words and resting upon that." 6 A. and P., 7. So Patterson J. "I see the necessity of not importing into statutes words which are not found there—such mode of interpretation only gives occasion to endless difficulties." King v. Durell, 12 A. and E., 468. Lord Denman: "We are required to add some arbitrary words to the section. We cannot introduce any such qualification, and I cannot help thinking the introduction of qualifying words into a statute, is a great reproach to the law." Lamond v. Eiffe, 3 Q. B., 910. Tindall Ch. J. "It is the duty of all Courts to confine themselves to the words of the legislature—nothing adding thereto—nothing diminishing." Everett v. Wells, 2 Scott, N. C., 531. So this Court in a cause where the 4th and 5th sections of an act were inharmonious, and the effort was to get the sections construed as if they had been transposed by Congress, refused so to do, took the law *as it was*, and said: "*The language of this clause is plain.* There is nothing in the context, rightly considered, which qualifies or affects it. There is, we think, *no room for construction.* Were we to adopt the construction contended for by plaintiff's counsel instead of adjudicating, we should legislate; that we have no power to do; our function is to execute the law, not to make it."

Doe, Lessee of Poor v. Considine, 6 Wall., 499.

"If the meaning of a statute be doubtful, the consequences are to be considered in the construction; but when the meaning is plain, no consequences are to be considered in the construction, for this would be assuming legislative authority."

The Queen v. Simpson, 10 Mod., 344.
Langsdon v. Potter, 3 Mass., 215.
Gru v. Grazier, Ib., 553.
Ayres v. Knox, 7 Ib., 306; Putnam v. Langley, 11 Pick, 487.
Pitman v. Flint, 10 Ib., 504.

"We are to look to the words in the first instance, and where they are plain, we are to decide on them; if they are doubtful, we are then to have recourse to the subject-matter; but at all events, it is only a secondary rule."

Buller J., 1 Term R., 101.

That the act of July was carefully framed to protect all

pre-emption claims to unsurveyed lands under the act of 1830; that every such claim was embraced and to be measured only by the conditions of that act in every respect *is said in terms*; that these are so unambiguous as to banish all excuse for construction; that there was in the reservation act nothing which limited the *power* of Congress to recognize the policy of 1830, as to such lands is equally plain. Now in a case where the act itself is so full, so comprehensive and so clear, how can a Court disregard its plain provisions; and import from a previous law doubts as to what Congress here meant? Rules of construction are needed *only* where the act is *in terms* doubtful. Said the judges in an old case, "we ought not to make any construction against the express letter of the Statute, for nothing can so express the meaning of the makers of an act as their own direct words: for *sermo est animi*," 5 Coke, 118. Says an able author, "The fundamental reason of the rules in regard to the language of Statutes is to be found in the consideration that unless courts as a general thing construe language in the same sense in which it was used by the legislature, that is, according to its ordinary and natural import, it would be in vain to attempt to preserve any harmony between these two great branches of the Government and the contrary doctrine would open the door to intolerable looseness of construction. If the courts could give to phrases new, unusual, forced or strained interpretations, if they could *insert* a word here or *strike* out a word there, all idea of conforming to the legislative intent would be lost, and cases turning on the construction of doubtful Statutes would soon come to be decided either *on judicial notions of policy* or on the peculiar equities of the matter in hand." Sedgw., Stat. and Con. Law, 261; Ed., 1857. So this Court "In construing these laws it has been truly stated to be the duty of the Court to effect the intention of the legislature; *but this intention is to be searched for in the words which the legislature has employed to convey it.*" Schr. Paulina v. U. States, 7 Cranch, 52. See also, Walter v. Harris, 20 Wend., 555; Clark v. City of Utica, 18 Barb., 451. Take the act of 14 July, it is wholly free from ambiguity. Where is there ground *in it* to call for construction? In fact, resort must be had to other sources to create a doubt of what that Statute is; and to do this is contrary both to principle and reason.

"A legislative act is to be interpreted according to the intention of Congress *apparent on its face.* Every tech-

nical rule as to construction or force of particular terms must yield to the clear expression of the paramount will of the legislature.

Wilkinson v. Leland, 2 Peters, 662.

"When a Statute is continued every person is estopped to say it is not in force; and as there is no alteration in the latter Statute as to the subject matter of the present indictment, it is no more than a continuation of the former *quoad hoc.*"

Lord Hardwick, Ch. J, in Rex v. Morgan., Stra. 1066.

"The rule is as we shall constantly see, cardinal and universal, that if the Statute is plain and unambiguous, there is no room for construction or interpretation. The legislature has spoken, their intention is free from doubt, and their will must be obeyed." Sedgwick, Stat. and Const. Law, 194, 2nd Ed. "It is only when the language is ambiguous that the courts are called on to construe or interpret." Ib. 195.

Boseley v. Mattingly, 14 B. Munroe, 89.
Case v. Walbridge, 4 Ind., 51.

"The language of the Statute is plain and unambiguous. When that is the case the will of the legislature must be obeyed."

Ellis v. Page and others, 1 Pick, 43.
James v. Patten, 2 Selden, 9.
In re Powers, 25 Vermont, 265.

"The decisive answer is the legislature has made no such exception. If the law is more restricted than the legislature intended it must be regulated by legislative intervention."

Shaw Ch. J, Commonwealth v. Kemball, 24 Pick, 370.

"In the present case it is not pretended that there is even a doubt that some Statute was intended to be continued, nor is it pretended that these words are applicable to any other Statute, or that there is a doubt whether any other Statute is continued by it. *The argument is that these words mean nothing.* * No man can doubt what act that is, and that the intention is that the *whole* of it should be carried into effect, * * and whatever is the intention of the legislature courts of justice are bound to support." Longmead's case, 2 Leach, Crown Law, 698.

"That any act prolonging the time for making this entry would continue the original right is not to be questioned. It is plainly the intention of the legislature and nothing can prevent that intention from being effectual, *but the intervention of some other title which the legislature cannot rightfully remove.*" Stevens v. McCargo, 9 Wheat., 513.

The failure of the judges in both France and England to enforce the plain provisions of statutes, practically making law by what they called construction, is one of the well known historic reproaches of jurisprudence. In both countries legislation was necessary to stop these abuses, the great blow in France being given by the wise men who framed the Code Napoleon, and in England by the stinging rebuke in the act 33 George III, ch. 13. This was provoked principally by the absurdities growing out of construing all statutes of a session as beginning at the same instant of time no matter what length of time had actually intervened between the dates of their enactment. This act made it the duty of the clerk of parliament to endorse in English upon every act the exact date that the royal assent was given, and made this endorsement part of the act. In America we have suffered but little from this disregard of the time at which acts are passed, the rule being well established, that "all acts, where it is not otherwise provided, take effect from their passage." Mathews v. Zane, 7 Wheat., 64; 1 Kent, 455. It is therefore somewhat surprising to see the Court of Claims, by a process which is also called "construction," utterly upsetting all the legal consequences legitimately flowing from the rule of common sense and sound law that an act takes effect from its passage. It is clear that it may within proper limits *be made retroactive* in terms, but otherwise it is a law from its date. I certainly would not have known, had not that Court enlightened me, that the act which never existed till July 14, 1832, was not for any purpose the law of *that date!* Record, p. 587. This portion of the opinion shews very clearly the wisdom of the rule, that where statutes are unambiguous they are to be enforced as the law from their passage just as the legislature chose in its wisdom or folly to make them, and where there is no question of the legislative power to pass them the plain duty of Courts is to accept the *ita lex scripta est*, enforce that, and avoid the introduction of any provision contradictory to

the plain words of the last statute. This must be sound law.

This point is closed with the following references:

"The only sound principle is to declare *ita lex scripta est*, to follow and obey. Nor if a principle so just could be overlooked could there be found a more unsafe guide or practice than mere policy or convenience. Men on such subjects complexionally differ from each other. The same men differ from each other at different times. *The policy of one age may ill suit the wishes of another; the law is not subject to such fluctuations.*"

Story's Conf. of Laws, 17.

"The ground of public policy is a very unsafe one, it is best to adhere to the words used in the act of parliament."

The Inhabitants of St. Gregory, Dwarris, 597.

"It would be going too far to make exceptions which the legislature has not made."

McEver v. Regan, 2 Wheat., 25.

"Whether we are considering an agreement between parties, a statute or a constitution, with a view to its interpretation, the thing we are to seek is *the thought which it expresses.* To ascertain this the *first* resort is to the natural signification of the words employed in the order and grammatical arrangement in which the framers of the instrument have placed them. If thus regarded, the words embody a definite meaning which involves no absurdity and no contradiction between different parts of the same instrument, then that meaning apparent on the face of the instrument is the one which *alone* we are at liberty to say *was intended* to be conveyed. In such case there is no room for construction. *That which the words declare is the meaning* of the instrument. Newell v. People, 3 Seld., N. York, 97. McClusky v. Cromwell, 1 Kernan, 593. "It is *only* where a statute *is ambiguous in its terms* that Courts exercise the power of so controlling its language as to give the effect they may suppose to have been the intention of the law-makers. In the statute before us the language admits of but one construction. No doubt can arise as to its meaning. It must therefore be its own interpreter."

Bedwell v. Whitaker, 1 Mich., 469.

"The first general maxim of interpretation is that *it is not allowable to interpret what has no need of interpretation***

To go elsewhere in search of conjectures in order to restrict or extend it is but an attempt to elude it."

Vattel, Lib. ii, ch. 17, § 262.

Gear v. The United States, 3 How., has been supposed to be an adverse decision, but rightly considered will be found not to be so.

The question was, Whether Congress intended by an act passed in 1834 to repeal the settled policy of Government reserving lead mine lands uniformly maintained since 1807. The whole purview of the act of 1834 was to make an additional land district to facilitate business, and the decision confines its operation to that object.

It did not offer any lands for sale, but the act of 1830 did, and Congress by the act of July provides that a certain class of those sales shall be made.

1. If it had been construed to open up the lead mine lands in that district for entry and sale, the policy would have been entirely exceptional, for they were every where else excluded. Here the reservation is exceptional, the policy of selling to the occupant general.

2. Within a few days of the passage of the act Congress legislated on the direct subject of pre-emptions, and expressly excluded reserved lands—lead mines amongst them—from entry. Here, on the contrary, Congress legislating on the subject say all the occupants entitled under the act of 1830 *shall be permitted to enter said lands.*

3. In the former case the two acts were passed, one in 1807, the other in 1834, and the question was strictly one of implied repeal! Here both acts were passed by the same Congress at the same session, and the latter is explanatory or operates as a proviso upon the former.

4. The whole purview of the act of July 14 is to secure to a special class of occupants under the act of 1830 the rights therein accorded. Congress made no new conditions nor any exceptions, and the court can make none. The legislation is directly upon a certain subject, the provisions free from ambiguity and positive in terms.

The two cases are wholly unlike in facts and principles involved.

Statutes in pari materia.

The acts of 29th May, 1830, April 20, and July 14, 1832, cover the land in dispute, are therefore in *pari materia*, and to *get at the intention* of the law-makers, may be read

together as one law. Such is claimed to be the broad principle controlling this cause. It is not admitted to be sound law thus stated; it ignores the right of Congress to change, alter, repeal, modify or explain preceeding law in but one way; it paralyzes the whole force of later enactments over those which have passed before them, unless worded in a particular manner; it assumes that a law, plain and unambiguous in terms, so that it needs no construction, is yet subject to be "construed to death," as if it was obscure; it overthrows the Constitutional division of powers, and under the false pretence of declaring the law, changes judges into legislators, when the last statute is clear and explicit. The legislative authority of Congress to change, alter, modify or explain a previous statute by one subsequent, can be maintained only by holding that the former statute in *pari materia*, does not control the plain and unambiguous language of a later act. If the rule is reversed, then the Court—not the legislature—legislates. But as the whole object in resorting to other acts in *pari materia* is to ascertain the intention, if in this cause this is done according to established rule, it still leaves the *clearly expressed* will of Congress paramount in reference to sales of land to a certain class of occupants under the act of 1830. The sound rule, however, is that no resort is to be had either to previous laws in *pari materia*, or to any other source for interpretation, if the language of the last act is in itself free from obscurity.

"The rule does not go to the extent *of controlling the language of a statute by the supposed policy of a previous enactment.*"

Goodrich v. Russell, 47 New York, 177.
See also Bennet v. Boggs, 1 Bald, 74.

"*Nor can other statutes in pari materia be resorted to where the language of the one under consideration is plain and explicit.*"

Ingalls v. Cole, 47 Maine, 530.

"I hold that in respect to the intention of the legislature, where the language is explicit, the Courts are bound to seek for it in the act, and are not at liberty to suppose that they intended anything different from what their language imports."

Porter in The Sups. of Niagara v. The People, 7 Hill, 511.

But for argument's sake, the claim thus broadly made is admitted, and then if frankly applied in the light of the rules, will show that this entry is valid.

We take these three acts just as they passed, and say they leave doubt as to Congressional intention; then let us test them:

"Regarding *intention*, the rules for construing statutes and wills are alike." Butler & Parker's case, 3 Coke, 27, b. Suppose the following will:

Item 1. It is my will that all my tenants in possession of any of my lands at this date and prior who cultivated any portion thereof in the year 1829, shall have the privilege of buying any quantity not to exceed 160 acres, including their improvements, at one dollar per acre, provided they prove to the satisfaction of my executor the facts of possession and cultivation, and pay for the land within twelve months after his qualification; and my executor is hereby authorized, empowered and instructed to make such sales and convey the land. This 29th day of May, 1830. (Signed, sealed and witnessed.)

CODICIL.

It is my will that no tenant on my lands *known as Blackacre* shall have the privilege of buying any of said lands, nor shall my executor sell the same; they are hereby reserved for my exclusive future disposal. (Signed, sealed and witnessed.) This 20th April, 1832.)

CODICIL.

It is my will that all my tenants on my lands who are entitled to the privilege of buying according to the first item of this my will, dated the 29th of May, 1830, shall be permitted to buy the said lands on the same conditions in every respect as therein provided; and my executor is hereby authorized, empowered and directed to make such sales to said tenants. This July 14, 1832. (Signed, sealed and witnessed.

Now, one of the tenants, on Blackacre, comes, proves and offers to pay, and the executor applies by bill to have the will construed so as to know whether *this* tenant should be allowed to buy! Is there any trouble about the *testator's intention?* The Court of Claims, to be consistent, would hold the sale void—*under the first codicil!*

It is not claimed by Government, or any one, that this quarter section was not offered for sale to the settler by the act of 1830; nor can there be any doubt that the act of July 14, 1832, in express terms, continues, and refers us to the act of 1830, for all the particulars which Congress designed should be taken into account in considering any claim to unsurveyed land embraced by that act. The act of 1834, did not, like this, refer to the act of 1830, for the time of cultivation and possession; yet, in a case arrising under it, this Court said: "Now as this act gives to the person claiming under it the benefits and privileges provided by the act of 1830, which it revives, we must look to this last act in order to ascertain what are those benefits and privileges; or, in other words, what is the character of the pre-emption right thus claimed, *and on what land the claim is allowed to operate.*" Wilcox v. Jackson, 13 Pet. The same construction is again given in United States v. Fitzgerald, 15 Pet. This is a much stronger case, for the act of July, instead of conferring new rights, and thus inaugurating a new policy, simply shows it to be the will of Congress, that rights previously conferred should be protected. It has been shown that if nothing was before the Court but the acts of 1830 and its supplement of 1832, the entry in this case would be unquestionably valid. As the intermediate reservation left the land still public and unappropriated to any other purpose, this last positive and unqualified declaration of the legislative will, is a Congressional commentary upon the text of that reservation as clear as human language can make it; and it has been shown to be the law, that where the language of an act is free from ambiguity, Courts cannot resort to other acts in *pari materia*, or to speculative opinions about objects and policy to change, alter or modify the last enactment. If the rule was otherwise, the Constitutional provision intrusting exclusive legislative power to Congress, would be a nullity. The whole power over the subject-matter belongs to that department of the Government, and their last distinct commands must be obeyed.

The liberal spirit in which the pre-emption laws have been interpreted and enforced, directly teach that the construction contended for is the true one—no restrictions upon the right having been permitted to operate where it could be prevented. "The policy of the Federal Government in favor of settlers on the public lands has been liberal. * * Later statutes enlarged the privileges so as to

embrace lands not subject to sale or entry, and clearly evince that the actual settler is the most highly favored of the entire class of purchasers. * * The liberal policy of Congress in favor of the actual settler, is better accomplished by a restrictive than an extensive interpretation of the exception clause in the Statute." Clemments v. Warner, 24 How., 295. The same judicial recognition of the feeling, purpose and will of Congress, runs through the whole list of cases where the question has come before this Court. Pollard v. Kibbe, 14 Pet., 368; United States v. Fitzgerald, 15 Ib., 407; Shephens v. McCargo, 9 Wheat, 506; Pollard v. Files, 2 How., 603; Lytle v. State, 9 How., 333; Marks v. Dickson, 20 How., 666; Clemments v. Warner, 24 How., 295; Cunningham v. Ashley, are all full of this teaching.

Tenancy of Belding.

This question is not made in the pleadings. If Hale had wished to do so, he should have made Belding's heirs parties to his petition, tendered an issue on the facts, and thus invoked the decision of the court on the point. Had this been done, the answer and evidence of Belding's heirs would doubtless have been as satisfactory and conclusive to the court as was the evidence on the same point to the Secretary of the Interior. It will not concern the Government whether the title accruing to Belding's heirs shall be held in their own right, or in trust for others.

The question of tenancy goes back to the claim of Perciful. If his claim was good, the tenancy becomes an immaterial question, because Belding's claim is based on the assumption that Perciful had no valid claim under the act of 1814. If this assumption is true, then, until the act of May 29, 1830, both Belding and Perciful were trespassers on the public land: and as there is neither contribution nor trust between wrongdoers, it follows that the question of tenancy becomes, in this event irrelevant. Admitting the tenancy, for the sake of argument merely, it is obvious that the assumed trust is illusory. That a tenant may enter the improvement which he has rented in the ordinary manner is undoubted; neither does any trust arise in that case. (Graham vs. Roark, 23 Ark., 19.) In Hoofnagle vs. Anderson, (7 Wheat., 211,) the court held that if the proceedings on which an entry is founded be irregular, the Government, *but not one having no prior equity*, can take

advantage thereof. The squatter on public lands can make no claim unless in accordance with some statute, and then, as was said in Rector vs. Ashby, (6 Wall., 144,) his claim must be governed and measured by the provisions of the statute, be they hard or lenient. But "when the act of April, 1832, was passed reserving the Hot Springs from sale, Perciful had no vested interest which a court of justice could recognize." (Hale vs. Gaines, 22 How., 160.) The doctrine of estoppel, by which the tenant is forbidden to deny the title of his landlord, is one in which both fraud and injury are essential elements. Without injury there is no estoppel. Conrad vs. Nicholl, 4 Pet., 296, 310; Hoofnagle vs. Anderson, *ubi sup.*) If Perciful had no title to the land, no claim which a court of justice could recognize, it mattered not to him, in any legal point of view, whether the Government bestowed the land on Belding or on another.

The fact that one pre-emption act does provide for vesting the title in the landlord is only an exception out of many statutes, and serves to confirm the rule.

The language used in Lytle v. State, 22 How., is, at first sight, likely to favor the doctrine of implied trust, but on a closer examination of the case it will be found not to do so.

Cloyes had rented a slab house of another on the public lands, one corner of which, as he discovered, extended over an adjoining quarter section. He obtained false affidavits showing his occupancy of this adjoining quarter section on the 29th May, 1830, and also that he had cultivated about three acres thereof during the previous year, as required by the act. He had not cultivated any part of it, and the court held that his pre-emption claim was fraudulent. It is in examination of the question of fraud that the court say that *the laws of Arkansas* protect improvements on public lands; that Cloyes was the tenant of Ashley, *and by those laws* could have been turned out on a notice to quit, and could not have denied his landlord's title.

This is true, but the laws of Arkansas do not control in the construction of the statutes of the United States. Nor do those laws prevail even in that State except for the protection of improvements *as such*. After the land has been entered, the person entering obtains a clear title, and owes no duty to the person making the improvement. (Graham vs. Roark, *ubi sup.*)

Any one can see how the doctrine that the entry would enure to the benefit of the landlord, is in defiance of the whole spirit of the pre-emption laws. Under its cover one landlord might, through the instrumentality of different tenants, obtain pre-emptions on large tracts of the public domain, and thus evade that provision which restricts the quantity of land to one hundred and sixty acres for each pre-emptor. This would build up the very system of speculation and monopoly which the pre-emption laws undertook to defeat, is clearly against public policy, and such contracts are void. So it is held, wherever the question has directly arisen, that a pre-emption does not feed an estoppel in favor of the landlord.

2 Land Laws, Instructions and Opinions, 467–542.
3 *Id.*, 129, 182, 188.
Jennings vs. Cordova, 20 Texas, 508.
Kennedy vs. Wiggins, 5 Humph., 127.
Reese vs. Crockett, 3 Yerg., 133.
Loftus vs. Mitchell, 3 A. K. Marsh, 594.
Davis vs. Gray, 3 Littell, 450.

Besides this, Hale expressly repudiates the basis of Belding's claim to pre-emption: "Your petitioner further alleges that the said Belding did not occupy the said land on the 29th of May, 1830." Amended petition, p. 81 Record. "Under all these facts, your petitioner insists that neither the said Ludovicus Belding in his life time, nor his said heirs since his death, ever had, or now have any legal right to claim said lands by pre-emption," p. 82. "Your petitioner further alleges that the entry allowed to be made by the said heirs of Ludovicus Belding was wholly void and illegal." Record, p. 82. Yet he claims a derivative title through Belding! "A party cannot occupy inconsistent positions, and when he has an election between several inconsistent courses, he will be confined to that which he first adopts."

Bigelow on Estoppel, 578.

Hale's first position was that Perciful's claim was under the act of 1814; that the Belding entry was wrongful, and now failing to establish his substantive claim, he cannot be permitted to claim through the occupancy and cultivation of Belding! The truth is this whole notion of acquiring the pre-emption right by proxy is nonsense, and wholly inadmissable.

But, I say again, that is not involved in this record.

By omitting to make Belding's heirs parties, so that they might controvert the allegations made in this behalf, Hale has failed to bring the question before the Court, and its discussion is irrelevant. Sto. Eq. Pl., Sec. 44.

Summary of Principal Points.

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8	Acts 29 May, 1830, 20 April and 14 July, 1832, considered as in *pari materia*....	36 to 38
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10	Entries entitled to all reasonable constructions to sustain them	17
11	Perciful's derivative title considered	40 to 43

NOTE.—I have learned that serious illness, which yet continues, prevents my associate counsel from preparing and filing a brief to prove the Perciful and Langlois claims worthless against the Government, and thus to shew the land in dispute was subject to Belding's pre-emption in 1830, too late for me to prepare one. Under the circumstances I adopt as my brief in reference to those claims that of the Hon. U. M. Rose, on file in the case of Wm. H. Gaines, et al., appellants v. John C. Hale and others in error to the Supreme Court of Arkansas, and respectfully ask the Court to consider that argument and auihorities therein cited in connection with Perciful and Langlois' claims.

All of which is respectfully submitted,

E. W. MUNFORD,
Of Counsel for
Wm. H. Gaines and others.

E. W. MUNFORD,

Supreme Court of the United States.

TERM OF 1875-'6.

No. 772.

THE HOT SPRINGS CASES.

WILLIAM H. GAINES AND OTHERS

vs.

THE UNITED STATES, HENRY M. RECTOR, AND OTHERS.

Brief for Rector, in opposition to Belding's Heirs.

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GAINES AND OTHERS *vs.* THE UNITED STATES.

BRIEF FOR HENRY M. RECTOR, IN OPPOSITION TO THE HEIRS OF BELDING.

No pre-emption claim to the Hot Springs, and the quarter section including them, could be other than fraudulent in 1830. No person could have such an exclusive possession or such cultivation as would give him a just and honest claim to a right to buy that quarter section for two hundred dollars. There were many people residing there then, and one of a hundred inhabitants of a village might as well have set up a claim to pre-emption, if it were built on public land, because he lived there and sowed a few seed in his back yard. Belding's claim, even on that ground, is simply ludicrous.

Upon the final investigation of this claim before the Register and Receiver, they agreed that Belding cultivated the land in 1829, and that he was in possession on the 29th of May, 1830; but the Receiver's opinion was that he was the tenant of Perciful, not holding possession in his own right; while the Register thought he held and cultivated in his own right.

The Commissioner, on the 26th of August, 1851, held that, as both officers had found that Belding did cultivate in 1829, the Register was correct in holding that the rule that the tenant's possession is the possession of the landlord did

not apply; and that though he obtained his possession by leasing from Perciful, the right of pre-emption inured to himself.

But it was *not* proven that Belding was in possession on the 29th of May, 1830. The facts proved before the Register and Receiver were, that Belding leased from Perciful; that he lived on the premises in 1829, and cultivated a small piece of ground; but in February, or at any rate prior to the 29th of May, 1830, he in his turn leased to a third person and changed his residence and home to another place. That testimony is all now before this Court. Then he was not in personal possession *of the tract* on the 29th of May, 1830. The fact that he removed his family from the Springs in February, 1830, besides being proved by other witnesses, is admitted by Mrs. Belding herself, in her affidavit made in 1829, and her deposition given in 1851.

Record: 522, 530, 531.

Test. of Samuel Sorter, 522: Bassett, 537: Calloway, 535: Kelly, 543: Ira T. Grant, Chancery Record, 120: Jonathan Irons, id, 122.

He underlet, or assigned his lease to Asa Thompson, in February, 1830, and after that had no other possession than that necessary for his trade of a vender of goods, occupying in 1830 a store only, lower down the valley, than the place which he cultivated in 1829.

Test. of Calloway; Record, 533, 536: of Mrs. Belding, 530: Bassett, 540: Davis, 545: Kelly, 544.

In fact, he did not even keep the store, himself, in 1830. It was in charge of a person employed by him.

Test. of Kelly; Record, 543: Bassett, 537, 541: Calloway, 535–6.

In 1838, Richard C. Hawkins, who is long since dead, made two affidavits in regard to Belding's possession of the Springs, and on the 27th of January, 1851, he testified

in regard to it again, when the case was being re-examined under orders from the General Land Office.

Record, 564.

Chancery Record, 34, 42, 116.

He resided at the springs in 1829 and 1832; and his testimony was, that during the year 1829, and up to the month of February, in 1830, Belding lived at the Springs, by virtue of a lease from Perciful, who then claimed them. He cultivated a little patch of ground, (mostly as a garden,) almost due north of the principal spring, and not less than one hundred and seventy-five yards from it. In the years 1829 and 1830, Perciful lived on his own farm, on the Ouachita River, five or six miles from the Springs.

Before May, 1830, Belding gave up his possession, leasing to Asa Thompson, and retaining no house there. This (he thinks) was as early as February. His mother-in-law still claimed to own a cabin there, to be used in case she should ever wish to return; but, with that exception, neither Belding nor any member of his family ever claimed possession of or right of possession of any tenement or other improvement, after the first of the year 1830, and the witness never heard from Belding in his lifetime that he claimed any right of pre-emption to the Springs.

Belding leased from Perciful in 1828, for five years. Early in 1830 he gave Thompson possession, under his lease, for the residue of the term; and about August, 1830, Hawkins bought of Thompson the unexpired term of the lease, it being for the years 1831 and 1832. About the 21st of August, 1830, Perciful, Belding, Thompson, and Hawkins met together, and by consent of all of them, and in presence of all of them, the lease from Perciful to Belding, and the sub-lease to Thompson, were cancelled and given up, and Hawkins took a lease from Perciful, and secured payment of the rent to him. At the expiration of the term he re-delivered possession to him.

After the lease from Perciful had been cancelled, and the Pre-emption Act of 1830 had passed, Belding, on the 2d of April, 1831, executed and delivered a writing, by which he acknowledged and made known that he did lease from Perciful the buildings and improvements at the Hot Springs, and that he had leased the buildings and all the privileges except the cabins, two of which were not his, to Richard C. Hawkins, until January 1st, 1833, at which time he agreed and bound himself to deliver all and every part of the buildings and improvements of the Hot Springs that he then or ever had, in the same condition as Hawkins was to deliver to him, unto Perciful if he should demand the same; and *that he had no pretension to the improvements of said Springs, except under the claim of Perciful.*

Record: 152, 204, 561.

The handwriting of Belding to this was proven by Warren Dunham, (who was then Judge of the County Court of the County,) who also testified that Belding acknowledged the execution of the instrument soon after its date. The handwriting was also proven by two other persons, and the instrument and affidavits were recorded on the 10th of January, 1842.

Copy of acknowledgment by Belding, and affidavits, Record, 152, 204, 561.

Proof was *not* made of cultivation by Belding in 1829, and "actual occupancy" on the 29th of May, 1830.

For, first, Belding no more "occupied" the land in 1830 than scores of others did; no more than one of a hundred dwellers in a village occupies the ground covered by the village by living in a hut upon a few square feet of it, with fifty neighbors. The law was not intended for such cases, and *cessante ratione, cessat lex.* It was intended for the benefit of men settling upon the public lands to make themselves homes, cultivating the soil to live thereby. The ad-

venturous settler doing that was entitled to the favor of the Government and to be permitted a preference over all others in purchasing the land that his labor had begun to make valuable. He had some equity. Belding had none. If he had claimed, and could have obtained a pre-emption, he would not only have defrauded the Government of the land, but Perciful also, who certainly had a better equity than he; for Perciful did erect buildings, and Belding erected none, except for Perciful, in payment of rent. He knew that, and therefore, though he said he *could* prove a pre-emption, he never attempted to do it.

The facts are undeniable that Belding purchased from Perciful his right of occupancy, becoming his tenant, for five years, in 1828, and in February, 1830, gave up the possession to Asa Thompson for the residue of the lease, and that he bound himself, in writing, in April, 1831, to set up no claim against Perciful; and he never did.

He kept a "grocery" there, a word which, in the vernacular of that region and of all Arkansas, and other Southwestern States as well, meant a place where spirituous liquors were dispensed in small quantities to thirsty persons, and probably h[illegible]vife had a bit of a garden there. A few flower-pots in the [illegible]ndows of the "grocery" would have been quite as effectual "cultivation." He put up some four or five houses (log cabins) for Perciful, and in February, 1830, gave them up to Thompson. He retained two cabins, but that was no possession of the quarter-section; no more than another person's boarding with him was possession. He simply had a store there kept by a clerk.

If his cultivation, in 1829, inured to his benefit, although he was tenant of Perciful, the possession of Asa Thompson in May, 1830, whether as his tenant or as tenant of Perciful, inured to his own benefit, and not to Belding's, who could not gain as landlord, in 1830, what he gained in 1829 as tenant against his landlord. Nor was he landlord of Thompson. Thompson's possession was not *his* possession, but

Perciful's. Belding could no more claim it as his than he could claim his own to be his and not Perciful's. Good faith and simple honesty are somewhat requisite to gain rights and equities, even in regard to occupancy and tenancies of public lands. Agreements and contracts *are* agreements and contracts, though made in regard to public land, and as to these, too, *fides observanda est.*

The Roman law even held that if a thief loaned for use, without compensation, a thing that he had stolen, he had his action to regain possession of it. *Nil commune habet proprietas cum possessione*, Ulpian said; and the law said: *Nemo sibi causam possessionis mutare potest;* no one can change for himself the title by which he possesses. He who held possession in the name of another, as farmer, lessee or depositary, was said not to *possess.* He had not the *jus possidendi.* He was only *in possessione;* and, *aliud est esse in possessione, aliud est possidere.*

Possession, without ownership, is the subject of sale or lease; and this just as well when the land belongs to the Government, as when it belongs to a third person. And the lessee of possession is in possession for the lessor, who possesses by him. If the lessee pretends to possess for himself, it is *dolus malus;* and it would have been a fraud on the part of Belding to claim against Perciful a right to the land, by virtue of Perciful's possession by him.

No matter who had held to the contrary, one in possession of public land as tenant of another could not become entitled, by virtue of that possession, to a pre-emption in his own right. Good faith forbade it. In law he does not possess, any more than a hired man does, who lives on land possessed by his hirer.

The notion of a Government official, that a leasing of public lands could create no equities, was very mischievous nonsense. The Sovereignty of the United States does not magnify their title of land-owners. He to whom they sell land has a title of equal dignity with theirs before it was

parted with. A lease is only of the possession, and if they permit a person to be in peaceable possession, he may lease it, and between himself and his lessee the lease will create the same equities as any other lease.

Non solet locatio dominium mutare; Ulpian says, Dig. 19, 2, 39.

Res aliena locari potest; and the lessor validly obliges himself to the lessee, to cause him to enjoy the thing, and for his damages and interest, in default of being able to fulfil this obligation. The ultimate reason for this is, that for an obligation to be valid, it suffices that what one promises to do, be possible in itself; and it is not necessary that it be in the power of him who has promised, to do what he has promised. Pothier: Contrat de Louage, No. 64.

Si quis conductionis titulo quamcumque rem accepit, possessione primo restituere debet, et tunc de proprietate litigare. L. 25, Code 4, 65.

It is an extraordinary proposition to be put in all its nakedness before a Court of *Equity*, that when a man was in peaceable and long continued possession of a tract of public land, and had erected houses upon it, it would come to pass that if another rented one or more of the houses from him for so many years, agreeing to build other houses in part payment of the rent, no obligation was created by this contract which the lessee was bound to respect; but that he might, having in that way got possession for the purpose, proceed to defraud his lessor, by setting up a right to purchase the land from the Government, in preference to his lessor, by virtue of his possession so obtained, and by the sowing of the seeds of vegetables in a garden. If that results from the proprietorship of the United States, they are the patrons of fraud, and the laws of Savages are both more just and more rational than ours; and over the portals of the General Land Office and over those of the Courts of Equity ought to be inscribed

Lasciate quà giustizia ed equità.

Good faith is a necessity of social existence and intercourse, even among Savages. That a bargain has for its object the possession of land, and improvements on land, of which the nation is proprietor and the parties were tenants by sufferance, or by law trespassers, in no wise relieves either party from the sacred obligation in good faith to keep and perform his promises. No man can agree to hold possession for and under another, and then use that possession to get the land for himself. There is a law that forbids that: Est igitur hæc non scripta sed nata lex; quam non didicimus, accepimus, legimus, verùm ex naturâ ipsâ arripuimus, hausimus, expressimus: ad quam non docti, sed facti, non instituti sed imbuti sumus.

Civile jus, says Cicero again, nequè inflecti gratiâ nequè perfringi potentiâ nequè adulterari pecuniâ debet. Neither ought it to be adulterated by the peevish carpings of a narrow construction. The vocation of a lawyer (legulejio non jurisconsulti,) so far as it is made to be the perverting of the law to purposes of injustice, the gaining of unjust causes, destroying equitable rights by use of the many traps that the law sets to catch unwary men, is a disreputable vocation; and so far as the law lends itself, its devices, its subtleties, its want of righteousness and equity, to enable the wrong to prevail against the right, and bad faith to win profit and advantage for the unconscientious and knavish, is a failure and a sham.

It is not the less true, that, Improbi hominis est mendacio fallere, because the lie consists in breaking an agreement made in regard to public land. The nation itself is but tenant by sufferance of God, in Whom is the only true dominion of the soil. Legis non officium patrocinari fraudi. Lex enim fons est æquitatis, Cicero says; mens, et animus, et consilium, et sententia civitatis posita est in legibus. The land laws of the United States are part of that law universal, of which he says, Ut corpora nostra sine

mente; sic civitas sine lege, suis partibus, ut nervis, ac sanguine, et membris, uti non potest.

Legum ministri, magistratus; legum interpretes, judices; legum denique idcirco omnes servi sumus, ut liberi esse possimus: and nothing so much deserves the untiring watchfulness of the magistracy as to prevent ill-faith making profit and prevailing, by means of the law.

The contract which Ludovicus Belding made with John Perciful, when he obtained possession, by means of it, of the premises that he afterwards occupied, was perfectly valid, and supported by a consideration perfectly good and valuable. The law of the State protected the possession of Perciful. Nobody could disturb it but the United States. Nine-tenths of the people of the State were living and paying taxes on Government lands. Even if, as a civil obligation, that of Belding was null, the natural obligation created by delivery of possession to him, was amply sufficient to sustain a promise expressed, and to cause a promise to be implied, that he would not use the possession so acquired, for the purpose of defeating Perciful's claim to the land, whether that claim was good or worthless. That was nothing to Belding.

In the possession and use of the property, he received the agreed and full consideration for his contract to restore possession at the end of the stipulated time. His agreement made his possession Perciful's possession. During the continuance of this possession, he could not, by means of such possession, and of the use of the land occupied, which his bargain enabled him to make, obtain a right to hold the possession *against* Perciful, relieved of his obligation to redeliver it at the end of the term. No act of Congress could invest him with a right to be a scoundrel, to violate his agreement, and to perpetrate an open and unblushing act of fraud. The Law has not yet stooped so low as to engage in as infamous a business as that.

It is quite true that this claim which has from the beginning set at defiance all the obligations of good faith and common honesty, should be spoken of as it deserves. There is no merit in it. If Belding's *actual* possession could gain for him, contrary to his agreement, and in violation of the at least natural obligation not to commit a fraud and violate the confidence reposed in him by Perciful, a right to appropriate to himself the buildings on the land and become the owner of it by purchase, certainly when this *actual* possession ceased, and some one else had it, the new possessor had at least the same *droit de mauvaise foi* as Belding had had.

But Thompson, and after him Hawkins, did not hold under Belding. Their possession was not his possession. Each bought the unexpired term of his lease. It will not be pretended that either of them would have violated any obligation to *him*, by obtaining a pre-emption in his own right.

The Attorneys-General have decided both ways, upon the question whether, where one person holds possession of public land under another, by lease or other agreement, the tenant *actually* in possession, and not the other, is entitled to the pre-emption. Mr. Berrien said, on the 22d of August, 1830, "I am of the opinion that the right of pre-emption belonged to the landlord. That a lessee cannot dispute the title of his lessor; and that the possession of the former is to be considered the possession of the latter, are settled principles of law, founded in justice and policy."

Instr. and Opin., 61. 2 Opin. of Attos.-Gen., 367.

Mr. Butler, on the 29th of March, 1837, held the contrary, thinking these general principles inapplicable to cases under the preëmption laws, a trespasser having no authority to make a lease; but he advised the Department to adhere

to Mr. Berrien's construction, rather than his own, the point being by no means free from doubt.

Instr. and Opin., 110. 3 Opin. of Attos. Gen., 128.

Admitting that the later decision was correct, and that the Land Office could under the law look to the *actual* possession, the question would still remain whether the tenant so acquiring a preëmption would not hold the title as trustee for his author, equity compelling him to abide by his contract, and observe good faith. The *exceptio doli mali* would have repelled an attempt by him to avail himself of his title, contrary to good faith and decency, before the Prætor. A Court of Equity, in which Christian judges preside, ought not to regard the obligations of simple honesty and good faith as less sacred than the Roman Prætor deemed them.

The Land Office may not be competent to adjudicate questions of equity so arising; but it cannot annul them. Improvements upon public lands are valuable, and in Arkansas they have always had the character of property. Justly so. It is essentially as much a crime to plunder or defraud a man of these fruits of his labor as it is to steal his horse. So public opinion in Arkansas always considered it. If a man obtains possession of land cleared by another, and of houses builded by him, under a contract to pay rent, and restore possession at a certain time, he is simply a knave and rogue, if he gets a title to the land for himself by means of that possession, even if the law becomes his accomplice and abettor.

But the Land Office *was* competent to say to Belding's heirs, and one of the Land Officers did say it, "We can know only *actual* possession. All the rights that possession gains by the law, we must give you, by virtue of your *actual* possession, wrong Perciful as it may; but you could gain no right, when you ceased to have that actual possession, by the actual possession of another holding under you. We cannot blow hot and cold for you with the same breath."

Thompson's possession, on the 29th of May, 1830, was not Belding's possession. There was no agreement to that effect. If he was to restore the possession to Belding at the end of the term, it was that Belding might comply with his contract, by restoring it to Perciful. This the last agreement showed: and Belding's own disclaimer of right as against Perciful, shows that he, himself, acted in entire good faith.

When Thompson came into possession, he held under Perciful, and not under Belding. The possession of each was either his own possession (for the purposes of the pre-emption act,) in which case Belding had no such possession on the 29th of May, 1830, as the law required, and so could not claim a pre-emption; or else the possession of Thompson was, as that of Belding had been, the possession of Perciful. It *was* the possession of Perciful, the *original* landlord, which neither lessee nor sub-lessee could dispute. Belding *assigned* the unexpired term of the lease to Thompson. At its expiration he would have no right of possession. Immediately upon that Perciful would become entitled to it.

While Belding lived at the Springs, he too was technically a trespasser. The right of preëmption was created, if at all, by a law enacted after he had *ceded* his possession and all his *right* to continued possession to another person, and made that person lessee of Perciful. Those who cultivated in 1829 obtained no right of preëmption, unless they remained in possession at the date of the act. He *sold* the possession, in February, 1830, of the Springs, and of the land cultivated in 1829, for the whole unexpired term of his lease. He *sold* this, the only possession that *could* give a pre-emption, was paid for it, and delivered possession. Thompson was not his lessee, but his vendee. He did not *lease*, he *ceded* to him. He retained a cabin, and had a clerk or agent in it, selling goods. Could he claim to possess the

quarter-section of land, including the Springs, as against *Thompson*, after taking his money for that possession?

If Belding had in his lifetime any manner of equity that entitled him to claim, as matter of right and justice, and within the spirit and purpose of the preëmption law, that the United States should admit his exclusive right to purchase these Hot Springs; and if the older claims are invalid, we hope that his heirs may be adjudged entitled to the quarter section including the Springs. No technicalities or narrow and astute constructions of the law ought to defeat their claim. They have proved all that they *can* prove; they have done all, in the prosecution of their claim, that they could do.

But what equity or right had he? what ground for demanding to be allowed to have these Springs for two hundred dollars? He was simply a vender of goods there, when the preëmption act passed—not holding even the lot of ground he had cultivated the year before. The cultivation was not that which gave him any substantial claim, like that of a husbandman who settles upon land to make it his home, and upon it makes his fields and pastures, subduing the forest at a loss of twenty or thirty times the Government price per acre, or breaking up the prairie at a cost three times that price.

He took his family to a new home, and chose for himself a new domicile, and in it established himself, before the passage of the preëmption act. He was no longer *possessor* of the Springs, or of the land around them. He was merely occupant of a cabin or two under another. He had done nothing and expended nothing to make it inequitable or hard upon him for the United States to refuse to sell him the land. He did not even intend to claim a preëmption there; he intended to claim one elsewhere. He could not claim one to the Springs without the most shameful bad faith, and he knew it, and never entertained a purpose to play the part of a knave.

If, therefore, his heirs have any right whatever, it is a strictly legal right, with no other merit or desert than that the letter of the law gives it to them.

It is proven by Ira T. Grant, that Belding built some cabins at the Hot Springs, in 1829, for Perciful, in payment of rent, and fenced in a garden. But he had a farm on the Gulpha creek, six miles from the Hot Springs, and Grant made a crop for him there; and there his family has lived ever since. In January and February, 1829, there were not many cabins at the Hot Springs. Belding lived in one, (keeping boarders,) "and had a little grocery in the other." Grant built three or four cabins for him. Below Belding's residence were other cabins, in one of which a man named Willard lived. Belding did not labor in his garden. He was "attending to his little grocery, and keeping boarders."

Testimony of Grant; Record, 175.

The act of 1830 gave the right of pre-emption to *settlers* or *occupants* of the public lands, then *in possession* of part of a quarter-section of land. If more persons than one were settled on it, the law gave to the two first actual settlers eighty acres each.

It is simply absurd to say that Belding was in such possession of the land in question or of any part of it, or was such settler upon or occupant of the public lands, as the law contemplated. The land which is now the capital of the State was public land of the United States until located by pre-emption floats in 1838. Patents issued on these in September, 1839. Yet, before 1838 it was by law a city. There were several "little groceries" there, and quite a number of gardens, and five or six hundred houses or more, in which people lived. The pre-emption act of 1830 was revived in 1834 and again in 1838. Was one of the inhabitants, in either year, cultivating a garden the year before, and living in his house, owned or rented, in possession of either quarter-section, within the meaning of the pre-emption laws?

Quite as much so as Belding was *in possession* at the Hot Springs.

Nobody could have a pre-emption right to the Hot Springs quarter-section, in 1830. Anybody went there, built his cabin or camp, made his bit of a garden, stayed as long as he cared to be from home, and went away. It was a place of public resort, in that manner, and nobody there was a settler upon or occupant of the public lands, within the meaning of the law.

The act of May 29, 1830, remained in force only one year. By express provision there could be no right of pre-emption under it, to any land reserved from sale by act of Congress. On the 29th of May, 1831, it expired.

On the 20th of April, 1832, the Hot Springs and four sections including them were reserved from sale. Before then, at any rate, Belding and all his kith and kin had removed from the Springs, and none of them were ever there again between 1832 and 1850.

Testimony of Whittington; Record, 196: Calloway, 534: Bassett, 540: Kelley, 544.

On the 14th of July, 1832, provision was made for those entitled to pre-emption under the act of 1830, who had been, for reasons specified, prevented from making proof and entering the land.

And on the 19th of June, 1834, the act of 1830 was revived for two years.

Undoubtedly the act of July, 1832, did not intend to confirm the right of pre-emption under the act of 1830, to persons who had removed from the land to which that act had given them a pre-emption right. The sole effect of this act of 1832 was to confirm the right of pre-emption to lands the surveys whereof had not been made and returned, and some other specified lands, of which we need not speak, and to permit the party to prove his right and enter the lands, when they should have been surveyed and the surveys

returned. It certainly intended that the party should still be in possession. Otherwise, if a person entitled to pre-emption under the act of 1830, had abandoned the lands, and another person had taken possession, cultivated in 1833, and been in possession on the 19th of June, 1834, the latter would have had no pre-emption, although one was expressly given him by the act of that date; and the person who had abandoned the land *would* have had one, could have purchased the land, and ousted the party entitled to pre-emption under the act of 1834.

Indeed, it was held by the officers of the Government that the act of April, 1832, only helped those who had lived on lands whereof the surveys had been commenced before the 29th of May, 1831, when the act of 1830 expired. But that was a wholly unwarranted addition to the law, and not a construction of it.

Instr. and Opin., 567, 582, 587, 648.

The only proper construction of the law, and the only one sustainable with due regard to public policy, is that the legislature never meant to grant pre-emptions to persons who should abandon the lands before proving their claims and purchasing; the pre-emption laws being passed for the benefit of permanent settlers, and not speculators. If not, what was the meaning of the provision of the act of 1830, revived by the act of 1834, that all assignments and transsers of the right of pre-emption, prior to the issuance of the patent, should be void? The very moment a man voluntarily abandons a tract of public land, to which he has not proved a pre-emption, he abandons all claim to it. He cannot so act as to induce or *permit* another to settle on it, improve it, increase its value, gain a right of pre-emption under subsequent laws, and then step forward, when the land becomes worth the fraud, set up his obsolete pre-emption, and rob the subsequent settler of the fruits of his labor. Continued possession *must* exist, or the right of pre-emption

dies. In this case Belding removed his home and family from the land before the right of pre-emption was even created by law; and soon after the law was passed, left it himself, and never returned; and the claim of his heirs is not only absurd, but fraudulent. There could not be a stronger case for the application of the doctrine of equitable estoppel. And though the United States might not apply that doctrine, except in favor of an adverse claimant under a subsequent law, yet if then they would be bound to apply it, or if the courts would apply it in favor of some other claimant, there is no valid pre-emption in such a case, even against the United States.

On any other construction of the law the man might have abandoned the land claimed, and gone abroad, settled in Canada or Australia, and still been entitled to prove his preëmption and buy the land, after its survey in 1838; and this he might do and at the same time prevent an actual settler, in possession, from securing the fruits of his labor, and possess himself of improvements in which neither his money nor his labor was invested. The law never meant to reward the abandoner of land, him who left it to become a thicket or a desert again, and to withhold its benefits from him, who, finding it thus vacant and deserted, hardly scarred perhaps by axe or plough, took possession, and settled on and improved it, and did all that the act of 1834 or 1838 required, to entitle him to a preëmption.

We know from Belding's own acts, that he did not consider himself entitled to any preëmption, and that he did not claim any. By the paper which he gave in 1831 he expressly declared that he had no pretensions to the improvements, and acknowledged that his possession was always Perciful's possession. It was not *his* intention to violate his contract.

He considered himself entitled to a preëmption under the act of 1830, to the farm on the Gulpha or Golfa, six or eight miles from the Springs. On the 7th of June, 1832, in con-

sideration of $50, he sold and assigned to his father-in-law, Jonathan Bassett, all his "right and title to an improvement *and right of preëmption*" to the place where Bassett then lived, having theretofore sold a life-estate in that place to Bassett and his wife. This was signed and sealed, witnessed by two witnesses, and acknowledged before the Presiding Justice of the County Court, on the day of its date, and four days afterwards it was filed for record, and recorded.

The "place" so conveyed was the Golfa farm.

Record: Copy of Conveyance, 214.

Record: Identification by Grant and Hale, 179, 214.

On the 7th of October, 1835, Bassett by deed of gift and conveyance, gave his daughter Lydia Belding (*donatione causâ mortis*) the same "possession and premises," where he lived, being the same premises purchased by him of Ludovicus Belding on the 7th of June, 1832, and deed recorded 11th June, 1832. This also was recorded in December, 1835.

Record: 215.

The only reply made to this is, that Mrs. Belding did not obtain title to that land by virtue of any preëmption, but entered it as an ordinary purchaser. That is utterly immaterial, though true. Belding's conveyance to his father-in-law proves that he considered himself entitled, under the act of 1830, to a preëmption on the Golfa. Then he did *not* consider himself entitled—he considered himself *not* entitled, —to one at the Hot Springs. He could not have two under one law. He could be entitled at the Golfa, only by having been an occupant of and settler upon that tract of the public land. In claiming to have obtained a preëmption there, he asserted that as a fact; and, as facts, that he cultivated there in 1829, and was in possession *there* on the 29th of May, 1830.

How can his heirs, when he *sold* this claim and received

a price for it, be heard to allege that he perpetrated a fraud on his father-in-law, which of course he did, if he had a pre-emption to the Hot Springs, and none upon the Golfa? Certainly, if they could and should establish the preëmption they claim, that would make him to have sold to Bassett that which was nothing, for nothing would have passed by the purchase.

It is true that the heirs of Belding were permitted to pay the purchase-money, and obtain a certificate for the land. But they did so upon the express condition *that they were not to apply for a patent upon it.* (Record, 551.) It was not a certificate of *purchase.* It *could* not be, because the act of 20th April, 1832, reserved the land from sale; and it was not *intended* to be. It was a gross blunder to permit the certificate to issue; and the use that was made of it afterwards was fraudulent. It was, in substance, only a certificate that they had been allowed to pay the purchase-money; and the plea upon which it was obtained was that it was necessary, in order to put them upon an equal footing with the other claimants. But it was immediately used for the *real* purpose for which it was asked—that is, to harass the other claimants withal, by suits for possession; it being, on its face, a sufficient title, under the laws of Arkansas, whereon to maintain ejectment.

The Commissioner, notifying the Register and Receiver of the decision as to the Belding pre-emption, on the 25th of November, 1851, (Record, 551,) said: "On the said 14th ult. an application was made by the attorney of the heirs of Belding, for permission to make an entry of said claim, 'in order that they may be placed in a proper position for the assertion of their rights hereafter in the Courts,' stating that, of course, under the decision of the Secretary, they should not ask for a patent."

The argument of Mr. Lawrence, with his application for allowance of the entry are in the Record, pp. 60 to 63. In the argument, he said of the entry asked to be allowed:

"It only enables the claimant to go into court against others who may hereafter obtain the legal title, and *then* try the question judicially, whether or not the claim was valid."

Rector held, at the time, and had held since 1839, a certificate from the Recorder of Land Titles, entitling him to a patent for the land, of which the Government had not sought to procure cancellation. It had simply stood still, refusing to issue the patent. As to so much of the quarter-section as the Hale survey covered, the *second* certificate, issued to Belding's heirs, was a mere nullity.

In fact, the Secretary and Attorney General were both overreached, and induced to arm Gaines with an apparent title, wherewith to vex, harass and persecute Hale and Rector for a score of years. For that purpose, permission to make the entry was asked; and the Secretary and Attorney General were intentionally deluded and misled.

It is quite certain, at any rate, that obtaining it in no way strengthened the claim. It was a fraud, like the claim itself; which was a fraud on the Government and a fraud on Perciful alike.

By what right could the Attorney General and Secretary of the Interior permit an *entry* and *purchase* of land which the law declared should not *be* entered? If Belding had had a valid right of pre-emption, the reservation destroyed it; as this Court has held; and yet Gaines was permitted to enter land reserved from entry, by virtue of a pre-emption destroyed by the reservation.

The certificate was null and void, for want of power to grant it. It was applied for to be fraudulently used, and it *was* used in violation of the conditions on which it was permitted to be issued. The Attorney General and Secretary were over-reached.

Attorneys General Cushing and Bates held this claim invalid, and the former said that it seemed particularly unfortunate that the entry by Belding was allowed, (6 Opin., 710, 10 id. 56,) and Mr. Secretary Thompson held that it was

"against law, and should not have been allowed." Therefore he directed that it should be cancelled.

It is needless to argue that after the reservation of the land from sale or entry, it was a direct violation of the law to allow an entry. The reservation annulled the right of pre-emption, if Belding had any; and yet the entry in the tract-book called the transaction a *purchase* and *sale*.

Frisbie *vs.* Whitney, 9 Wallace, 187.

The Yosemite Valley Case, 15 Wallace, 77.

But, it is argued, the certificate never was *in fact* cancelled, because no marks or words of cancellation appear on it. But this will not do. The heirs of Belding endeavored to prevent cancellation by a bill in equity against the Secretary in the Circuit Court of the District of Columbia, which was dismissed. On appeal to the Supreme Court the decree of dismissal was affirmed. When a Court of Equity decrees cancellation of a fraudulent conveyance, it does not have it brought into court and cut to pieces, or defaced by blotting or by lines drawn across it. It is cancelled by the effect of the decree. Undoubtedly the original meaning of *cancellare* was, to make like a lattice, and, in the Latin of the jurists, to strike through a writing in the form of a lattice, or St. Andrew's cross, to cross out. But when Bishop Jeremy Taylor uses the phrase "our sins uncancelled," he has good warrant for it, in a thousand similar instances of derivative meanings of words. At the present day, to *cancel* signifies simply to annul, or to put an end to.

It matters nothing whether the certificate has been *cancelled* or not. The Secretary had the power to declare it a nullity, issued in violation of law, under the influence of some hallucination on the part of his predecessor, and to order that no patent should issue on it: for it was agreed when it was applied for that no patent should be asked for.

It matters little to *us*, for we hold an older and better certificate, unrecalled, uncancelled, on its face entitling us to a

patent; and against it, the Belding claim is no better with a certificate than without it.

And, unless Perciful or Hale, or the heirs of Belding, have "*title*," either legal or equitable, to the quarter section that includes the Hot Springs, he or they had no right to present themselves in the Court of Claims. It must be, not a mere right to preference in purchasing, but a *title*, either legal or equitable. Neither has had even such a right of preference, since the reservation; but if either had, that is no *title*. We need not define the word "*title*." Its meaning is too well known. The law that grants a right of pre-emption is but a mere *promise*, so long as the right is unexercised,—a promise, that when the land is to be sold the party shall be entitled to purchase, in preference to others. This *promise* is not "a *title*, either legal or equitable, to the whole or any part of the four sections of *land*, constituting what is known as the Hot Springs' reservation. There is not even possession. If Perciful ever had possession, he never resided on the land, and he *did* reside elsewhere. He died nearly forty years ago, out of possession. Belding never had possession after August, 1830, forty-one years ago. What sort of equitable title could this promise, recalled and revoked by the act of reservation, give either of them, on which a bill in Equity for *legal* title can be maintained? In Frisbie *vs.* Whitney, this Court expressly decided that one who has only a right of preference, unexercised, although he endeavors to exercise it, and permission to do so is denied by the officers of the Government, has no vested interest in the land," no vested right to it—no right at all as against the Government. The pre-emption acts, the Court said, adopting the language of Mr. Attorney General Cushing, "do not confer on the pre-emptor *in posse any right or claim* to be treated as the present *proprietor of the land*, in relation to the Government." And, adopting the language of Mr. Attorney General Speed, "The land continues subject to the absolute disposing power of Congress, until

the settler has made the required proof of settlement and improvement, and has paid the requisite purchase-money."

We will not say that if either Perciful or Belding had a valid right of pre-emption, made the proof of it, and had not abandoned the land, when the act of reservation passed, their claim would not be within the act of 1870; for that, like all beneficent acts, is to be liberally interpreted, that the beneficent intention may have its full effect. We think that a valid and complete pre-emption right, complete before the reservation, would be within the equity of the act.

But there is no such pre-emption here. Perciful did not inhabit and cultivate at the Hot Springs prior to 1814, and was entitled to a pre-emption at another place: Belding lived and died without setting up any claim to the Hot Springs under the act of 1830, did assert a right to a pre-emption elsewhere, and wholly abandoned his boarding-house and grocery before the passage of the act of 1832.

Hale prays that if the Belding pre-emption should be adjudged valid, and the decree is to be against the United States, in favor of it, then the heirs of Belding be decreed to take it as trustee for him.

If for any reason recognized by Courts of Equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, and by the laws which Congress has made on the subject, it ought to go to another, the Court of Equity will convert him into a trustee of the true owner, and compel him to convey the legal title.

Stark *vs.* Storrs, 6 Wallace, 402.

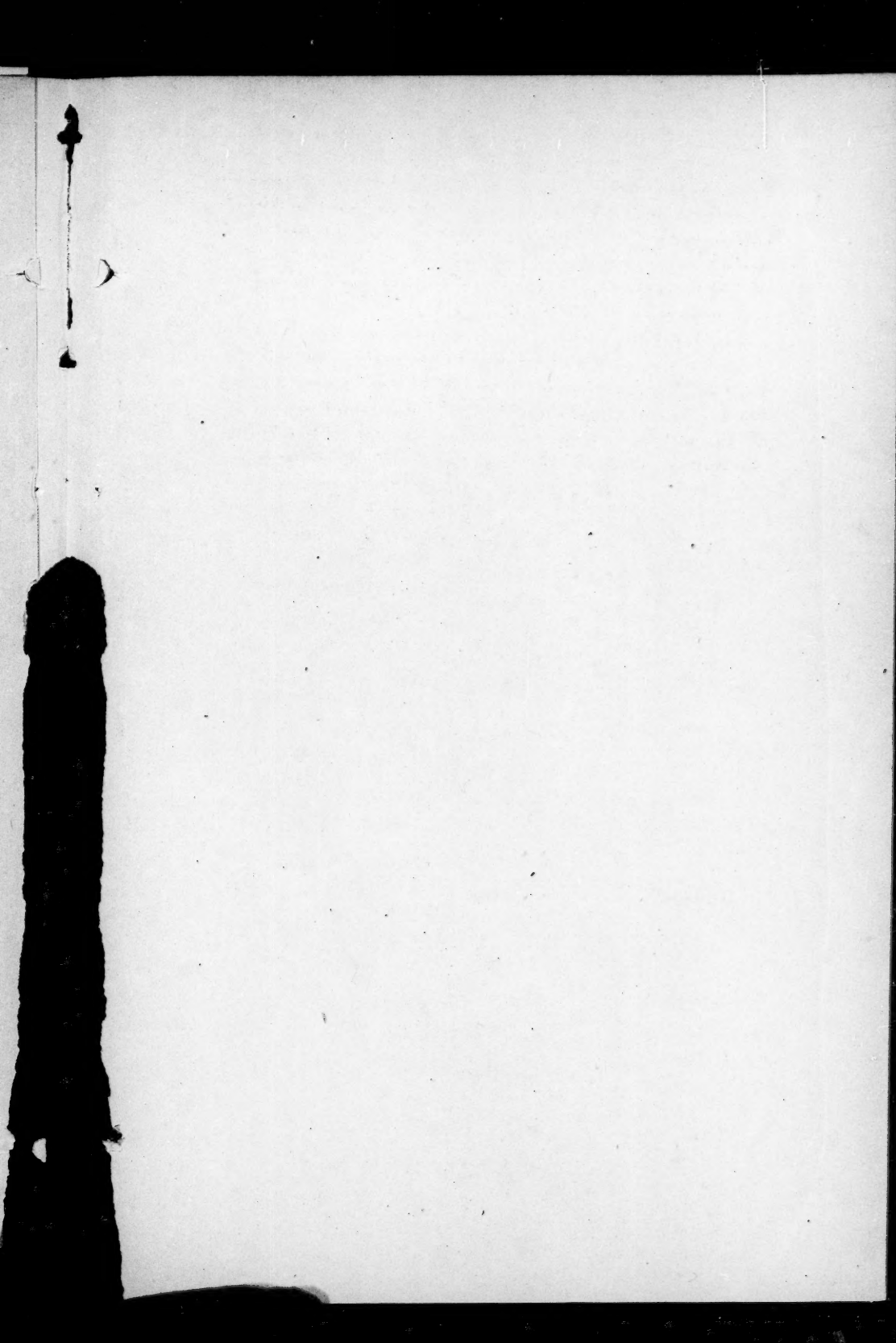
Johnson *vs.* Towsley, 13 Wallace, 85.

There is no doubt that a Court of Equity in Arkansas would consider Hale's claim in favor of Perciful well founded. Unquestionably Belding was estopped, not only by his agree-

ment made in 1831, but by his original contract of lease and renting, to set up a pre-emption right, founded on his possession so acquired, against Perciful. It is as clear a case as ever was. And the question is one of which the Court of Claims had no jurisdiction, and which could be asserted only in the Courts of Arkansas.

And Belding's Heirs would not be trustees for Hale alone, but for Hale and Rector, the latter having, by the same right as Hale, and under Milus H. Woods, a one-fourth interest in the Perciful pre-emption. For which reason Rector has a right to defend against the claim of the Heirs of Belding, and to have the benefit of Belding's agreements.

ALBERT PIKE,
ROBERT W. JOHNSON,
JOHN B. SANBORN,
CHARLES KING,
Of Counsel for Rector.



In the Supreme Court of the United States.

HENRY M. RECTOR AND OTHERS
vs.
THE UNITED STATES.

Brief for the United States.

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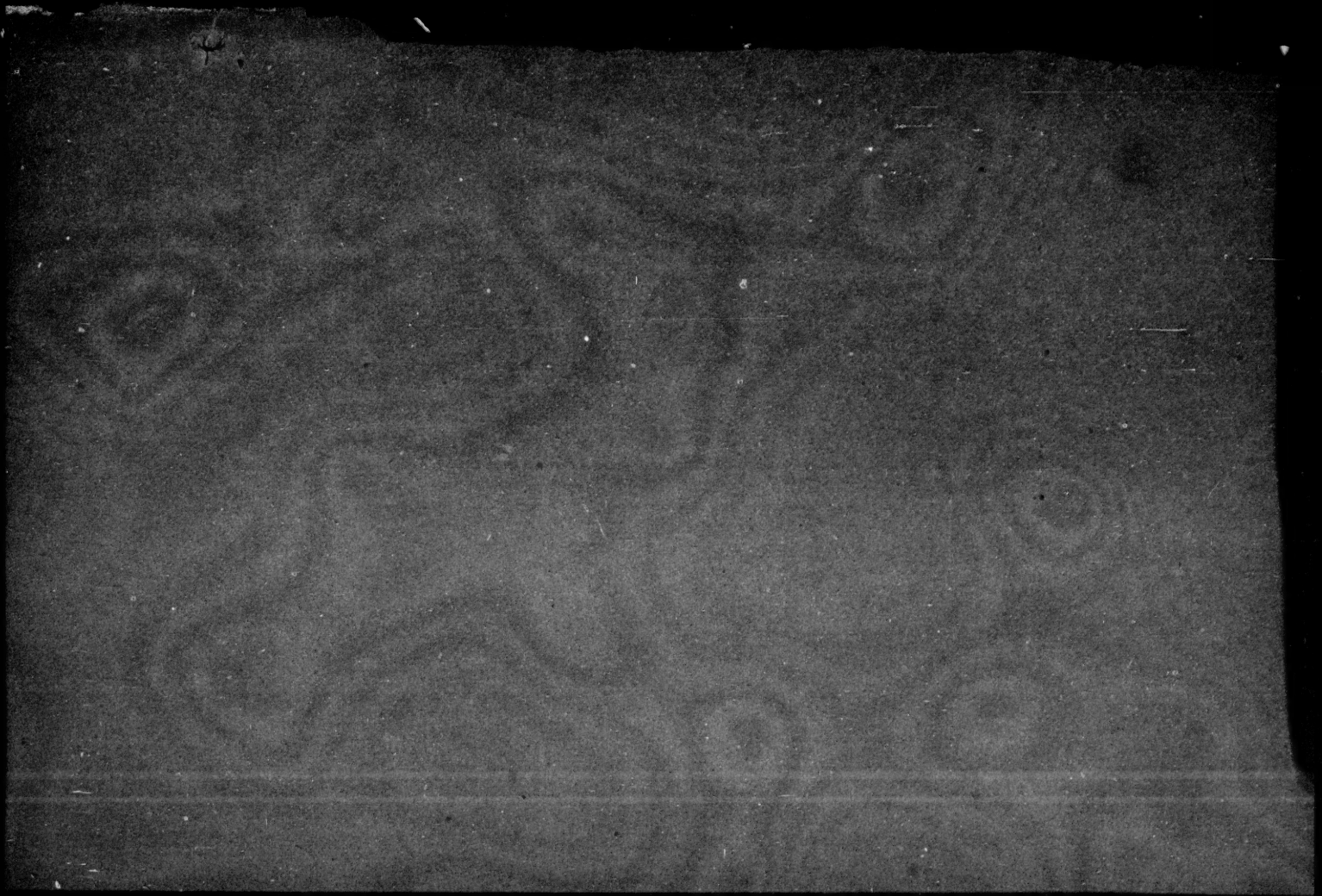
Attorney-General.



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Attorney-General.

In the court below there were five claimants; three of the parties, however, sought to recover upon the same title.

All claim title from the Government.

I. The first, known as the *Percifull title*, is founded on the pre-emption *Act*, 12*th April*, 1814, (3 Stat. L., p. 121, § 5,) and the prior inhabitancy and cultivation of the tract by John Percifull. It is represented in this case by the claimant *Hale*.

II. The second, known as the *Rector title*, is founded on the *New Madrid Act*, 17*th February*, 1815, (3 Stat. L., p. 211,) and the location of what was known as a New Madrid certificate by Samuel Hammond and Elias Rec-

tor in 1820. This title is represented, respectively, by the claimants, (1) *Rector*, (2) *McKay & Gitt*, and (3) *Russell.*

III. The third, known as the *Belding title*, is founded on the pre-emption *Act*, 29*th May*, 1830, (4 Stat. L., p. 420,) and the actual possession and cultivation of the tract in that year and on that day by Ludovicus Belding. It is represented in this suit by the claimants, *Gaines et al.*

In 1812 the Hot Springs, then in an unsettled region, were resorted to by invalids for the benefit of the waters. John Percifull, as is claimed by his representatives, built the first house at the springs in 1813; the claimant under this title insists that, under the pre-emption act above cited, he has title to the springs.

In 1814 Congress passed the pre-emption *Act*, 12*th April*, 1814, (3 Stat. L., p. 121,) which provides "*that every person and the legal representatives of every person who has actually inhabited and cultivated a tract of land*," &c., "*shall be entitled to the right of pre-emption in the purchase thereof.*"

In consequence of an earthquake, which happened in 1814, and destroyed the lands of certain settlers in the county of New Madrid, in the Missouri Territory, Congress passed the *New Madrid Act*, 17*th February*, 1815, (3 Stat. L., p. 211,) by which it was provided that "*persons whose lands have been materially injured by earthquakes shall be, and they are hereby, authorized to locate the like quantity of land on any of the public lands of the said Territory, the sale of which is authorized by law.*"

Under this act the Rector title is claimed to be valid.

The act is as follows:

AN ACT for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes.

"*Be it enacted, &c.*, That any person or persons owning lands in the county of New Madrid, in the Missouri Territory, with the extent the said county had on the tenth day of November, one thousand eight hundred and twelve, and whose lands have been materially injured by earthquakes, shall be, and they are hereby, authorized to locate the like quantity of land on any of the public lands of the said Territory, the *sale of which is authorized by law: Provided*, That no person shall be permitted to locate a greater quantity of land under this act than the quantity confirmed to him, except the owners of lots of ground or tracts of land of less quantity than one hundred and sixty acres, nor shall any person be entitled to locate more than six hundred and forty acres, nor shall any such location include any lead-mine or salt-spring: *And provided also*, That in every case where such location shall be made according to the provisions of this act the title of the person or persons to the land injured as aforesaid shall revert to and become absolutely vested in the United States.

"SEC. 2. That whenever it shall appear to the recorder of land-titles for the Territory of Missouri, by the oath or affirmation of a competent witness or witnesses, that any person or persons are entitled to a tract or tracts of land under the provisions of this act, it shall be the duty of the said recorder to issue a certificate thereof to the claimant or claimants; and upon such certificate being issued, and the location made on the application of the claimants, by the principal deputy surveyor for said Territory, or under his direction, whose duty it shall be to cause a survey thereof to be made, and to return

a plat of each location made to the said recorder, together with a notice in writing, designating the tract or tracts thus located and the name of the claimant on whose behalf the same shall be made; which notice and plat the said recorder shall cause to be recorded in his office, and shall receive from the claimant for his services on each claim the sum of two dollars for receiving the proof, issuing the certificate, and recording the plat and notice as aforesaid; and the surveyor shall be entitled to the same compensation for his services from the party applying as is allowed for surveying the public lands of the United States.

"SEC. 3. That it shall be the duty of the recorder of land-titles to transmit a report of the claims allowed and locations made under this act to the Commissioner of the General Land-Office, and shall deliver to the party a certificate, stating the circumstances *of the case, and that he is entitled to a patent for the tract therein designated,* which certificate shall be filed with the said recorder within twelve months after date, and the recorder shall thereupon issue a certificate in favor of the party, which certificate, being transmitted to the Commissioner of the General Land-Office, shall entitle the party to a patent, to be issued in like manner as is provided by law for other public lands of the United States."

(3 Stat. L., 211.)

as alleged - The origin of this Rector title was in Francois Langlois who owned two hundred arpents of land in New Madrid County at the time of the earthquake, and at the time of the passage of the act. this is disputed.

It is not claimed that Langlois did any act except through his attorney, named Joseph Story, to whom it is claimed that he gave a power of attorney dated November 10, 1818. (Record, page 277.)

This power of attorney purports to be signed simply by a mark, and was never filed until *twenty years* after it purports to have been executed.

On the 26th of November, 1818, there appears a certificate from the office of recorder of land-titles, and a transfer of that certificate to Samuel Hammond, dated January 4, 1819, by the said Joseph Story. (Record, p. 276, folio 299.)

On the 27th of January, 1819, Samuel Hammond and Elias Rector applied to Gen. William Rector, surveyor-general of the public lands, asking for a survey to "include the Hot Springs." It does not appear that Elias Rector had any other claim at that time than that he was a brother of William Rector, the surveyor-general.

There is no evidence that the surveyor-general, William Rector, ever gave any written order or authority to make the survey, but a man named F. R. Conway swears that fifty-two years before he testified, his brother, James S. Conway, was a deputy surveyor, and that Elias Rector applied to the surveyor-general for a survey, and that the surveyor-general directed James S. Conway to make a survey. (Record, pp. 345–349.)

It is not even suggested that Langlois, Story, or Hammond ever made any such application, or that any one else did, except Elias Rector, the brother of the surveyor-general, who appears to have had no claim or right whatsoever.

On the 23d of September, 1850, Henry M. Rector presented a paper at the surveyor's office at Little Rock, claiming that it was a copy of the survey of the lands located. (Record, p. 283.)

This Henry M. Rector is the present claimant, and a son of Elias Rector, before named.

The only claim, or shadow of title, as against the United States which Elias Rector or the present claimant, Henry M. Rector, even claimed to have, rests upon a deed made by Hammond to Elias Rector, *a month after* application had been made by Hammond and Rector for the survey. (Record, p. 284.) And this deed only conveys an undivided *half;* and this deed does not purport to have been acknowledged until the 2d day of March, 1819. (Record, p. 285.) And again on the 18th of March, 1820. (Record, p. 285.) Said deed was not recorded until the 19th of May, 1820. (Record, p. 285.)

Some six months after the application for survey by Hammond and Rector, Langlois and wife made their deed to Joseph Story, conveying all their rights in the property in question. (Record, p. 279.)

On the 24th of February, 1821, long after the date of the certificate of survey, Joseph Story made a transfer of his interests to Hammond and Rector. (Record, p. 280.)

The present claimant, Henry M. Rector, claims, under a will of his father, Elias Rector, dated August 9, 1822. (Record, p. 286.)

No other paper title is set up in the plaintiff Rector.

And if the United States have not parted with their title by virtue of the acts and in the manner above stated, then it is clear that the title still remains in the United States.

No officers of this Government could, by any acts of theirs, divest the United States of the title to these lands, except in strict accordance with the provisions of law.

The Attorney-General submits the following points:

FIRST.

No claimant, under the New Madrid act, could divest the United States of their title, except by a strict compliance with the provisions of that act.

No lands could be located under this act except "*the public lands of the said Territory, the sale of which is authorized by law.*" (3 Statutes at Large, page 211.)

It is entirely clear that at the date of the pretended location the "sale of these lands was *not* "*authorized by law.*"

No person had authority to sell them, and hence a location of lands whose "*sale was not authorized by law*" was void.

The only authority of law for the sale of lands comes of the acts of Congress.

No act of Congress can be cited which authorized the sale of these lands at the date of the pretended location, *or at any other time.*

It is quite preposterous to claim that lands can be sold by *authority of law* until a law has been passed, or some act has been done, giving authority to sell.

SECOND.

From the beginning, it has been the policy of the United States to offer no public lands for sale until the same had first been surveyed.

As early as 1785, a system of rectangular survey of the public lands was inaugurated; this was before the formation of the Constitution of the United States.

After the adoption of the Constitution, and in May, 1796. (Statutes at Large, 464.)

This act provides for the survey, and for sale after survey, of certain public lands, and specifically directs the rectangular survey.

Under this act, no sale could be made until after survey.

This act was passed before Louisiana and the Missouri Territory, which is part of the Louisiana acquisition, came to the United States.

The Missouri Territory, which embraced the Hot Springs lands, was ceded to the United States by France April 30, 1803.

In 1806, on the 28th of February, Congress passed an act extending the powers of the surveyor-general over all the public lands in the Territory of Louisiana to which the Indian title had been, or should thereafter be, extinguished. And this act makes certain provisions in relation to surveys by the surveyor-general. (Vol. 2, Stat. at Large, p. 352.)

By the act of March 3, 1811, sec. 8, (2 Stat., p. 665,) provision is made for the survey and division of the lands in Louisiana Territory, under direction of the President, in the same manner as provided by law in relation to the lands of the Northwest Territory.

The ninth section of this act provides for the establishment of a land-office, with the usual officers, for surveys, under the direction of the President; and the tenth section provides for sales of these lands *after they are surveyed*. The Hot Springs lands were part of this Louisiana Territory; the name of this region was changed to the Missouri Territory by act of Congress June 4, 1812. (2 Stat. at Large, 743.)

On the 17th of February, 1815, the New Madrid act above cited was passed. (3 Stat. at Large, 211.)

Almost immediately after the passage of this act, the Commissioner of the Land-Office gave instruction to the surveyor-general to survey lands in the Missouri Territory.

It appears from the Record (page 305) that the surveys were commenced on the 27th of October, 1815, and completed as far as the Missouri River on the 28th of December of the same year, and that subdivisional surveys were made in the year 1816.

It is not pretended that any location by the claimants in this case was ever made until several years after these surveys, and not until July 16, 1820, and it is conceded that the pretended location was not made upon any surveyed lands or upon *any lands the sale of which was authorized by any law.*

The Hot Springs lands were never even surveyed until 1838.

THIRD.

At the passage of the New Madrid act, in 1815, the Indian title to the Hot Springs lands had not been extinguished, and of course it was impossible for Langlois to have made any valid location upon these lands.

The Indian title was not extinguished until August 24, 1818. (See the treaty.)

On the 26th of April, 1822, (3 Stat. at Large, 668,) an act was passed to relieve certain of the New Madrid sufferers, entitled "An act to perfect certain locations and sales of public lands in Missouri." This act is very important, and entirely cut off the claimants from any right, if they ever had any, by fixing the limit of one year within which they were to perfect their location.

They could not have obtained any relief under this

act, for they had no unperfected rights under any law which this act was intended to perfect.

In 1832, (4 Stat. at Large, 505,) an act was passed providing "that the Hot Springs shall be reserved for the future disposal of the United States, and shall not be *entered*, *located*, or appropriated for any *other purpose whatever*."

These Hot Springs lands were never surveyed until 1838, and were never offered for sale at any time. (Record, p. 573.)

FOURTH.

It is conceded that the title to the Hot Springs lands was once in the United States; it is there *now*, unless it has been divested in some lawful way.

When a man's farm has been destroyed by an earthquake or a flood, it is not of common-law right that he can claim that the Government should give him another.

If a Government makes a donation to one of its citizens, and attaches a condition to the gift, the precedent condition must be complied with before title to the thing given can vest in the donee. No doctrine is more firmly settled.

The New Madrid act of February, 1815, gave lands to those who had lost by the earthquake, upon certain *specific* conditions. (See the act, at page 2d of the brief.)

These conditions are plain. They have not been complied with in *any respect*, and the evidence offered by the Rector claimants proves that the claim had its origin in a shallow fraud, by which, under the shadow of another name, one Elias Rector, in 1820, undertook to appropriate to himself these invaluable springs and the surrounding lands, the great value of which was well known prior to 1812.

As evidence of the worthless claims of Rector, read opinion of Attorney-General Wirt, dated May 11, 1820, vol. 1 Opinions, 263. Also that the lands must first be surveyed, vol. 1, p. 274.

Langlois' power of attorney, Record, p. 277.

The certificate, No. 467, p. 276.

Joseph Story, November 27, 1818, p. 303.

Assignment, January 4, 1818, p. 276.

Langlois to Story, p. 279.

Application of Hammond and Rector, July 27, 1818, p. 282.

Hammond to Rector, one-half, p. 284.

Alleged copy survey, No. 467, July 16, 1820, p. 283.

Survey appeared in 1850, p. 417.

Read old Conway's evidence, pp. 344, 348, 349.

Report to Secretary of the Interior, November, 1855, p. 159.

Langlois did not own the land; pp. 443, 445, 446, 455, 462, (table,) 408, (in 1811,) 495, 344.

Elias Rector had lost no lands by the earthquake. At the time he applied for a certificate the only pretended right he had was that he was a *brother of the surveyor-general.*

Samuel Hammond, who joined with Elias Rector in 1819 in the application to the surveyor-general, who was Rector's brother, immediately drops out of the case and never made any further claim.

Thus Elias Rector, who lost no lands by the earthquake, who had not even the pretext of any sort of assignment of any claim whatever, except to one-half, and that made a month after the application, appears as the sole owner of these springs and the lands surrounding, against the United States, who have never sold them or parted with the title to any one, but who have, by solemn act of Congress, reserved these lands and directed that they should not be sold at all.

There appears no gleam of equity in this Rector claim, and I proceed to show that there is not a shadow of law to support it.

The only law which can be invoked in support of the claim is the New Madrid act of 1815. That act requires—

1st. The appliant must have *owned lands* in the county of New Madrid which were "*materially injured by earthquakes.*"

2nd. Such person was authorized to locate only such "public lands in said Territory *the sale of which is authorized by law.*"

Provided, &c., * * * "nor shall any person be entitled to locate more than six hundred *and forty acres, nor shall any such location include any lead-mine or salt-spring.*" The limit of 640 acres proves conclusively that the act contemplated the usual survey.

Even the act of 1822, before cited, would not have cured the defect in this location, but the act itself, by limiting the cure to one year after its passage, cut off from the claimant even this right if it had ever existed. (See 2nd section, p. 668, Stat. at Large, vol. 3.)

We have already shown that the reservation act of 1832 forbade the sale of these Hot Spring lands.

It will be convenient here to refer to the dates of certain acts of Congress.

In 1816 Congress passed the *Act 29th April*, 1816, (3 Stat. L., p. 325,) creating a new office, subsequently known as that of surveyor-general.

In 1818 the Indian title to this part of the Territory was extinguished by the *Quapaw treaty 24th August*, (7 Stat. L., p. 176.)

In 1820 the Attorney-General and Secretary of the Treasury decided that locations of New Madrid warrants could only be made upon public lands which had been surveyed and offered for sale, and that the locations must conform to the sectional lines of the public surveys. Instructions to this effect were issued to the officers of the Land-Office.

In 1822 Congress passed the *Act 26th April* (3 Stat. L., p. 668) providing that the location theretofore made of warrants "*issued under the New Madrid act, if made in pursuance of that act in other respects, shall be perfected into grants in like manner as if they had conformed to the sectional or quarter-sectional lines of the public surveys.*" The act also provided that all such warrants "*shall be located within one year after the passage of this act, in failing whereof the same shall be null and void.*" It was subsequently provided by the act 2d March, 1827, "*that the location of lands heretofore made according to law*" "*shall*

be perfected into grants in the manner prescribed" by the New Madrid act, "*any construction thereof to the contrary notwithstanding.*"

In 1830 Congress passed the *Act 29th May*, (4 Stat. L., p. 420.) It provides that "*every settler or occupant of the public lands prior to the passage of this act, who is now in possession, and cultivated any part thereof in the year* 1829, *shall be, and he is hereby, authorized to enter with the register*," &c., "*a quarter-section.*" It also provides "*that the right of pre-emption contemplated by this act*" shall not "*extend to any land which is reserved from sale by act of Congress*," &c., "*and that this act shall be and remain in force for one year from and after its passage.*"

In 1832 Congress passed the *Act 20th April*, (4 Stat. L., p. 505,) which provides that the Hot Springs "*shall be reserved for the future disposal of the United States, and shall not be entered, located, or appropriated for any other purpose whatever.*"

In 1832 the same Congress passed the *Act 14th July* (id., p. 603) providing that persons entitled to pre-emption under the act 1830, who had not made proof and entered the same within the time limited in that act, "*in consequence of the public surveys not having been made and returned*," &c., "*shall be permitted to enter the said lands, on the same conditions in every respect as are prescribed in said act, within one year after the surveys are made.*"

The act was also further extended by the *Act 19th June*, 1834, (4 Stat. L., p. 678,) and by the *Act 22d June*, 1838, (5 Stat. L., p. 251.)

In 1838 the first public survey of or around the Hot Springs was made, the plot thereof was certified on the 30th April, and the lands, except as reserved, were subsequently offered for sale.

FIFTH.

The claimant does not allege that he has ever had a patent, or been vested with the legal title, but claims that he has the right to such patent. We insist that he has no such right, for the reasons already given, and for the further reason that he has never done the acts necessary to entitle him to a patent.

No certificate was ever issued to Elias Rector.

No notice and plat was ever offered in the office of the recorder, nor was even sent there; and no report of the claim or the location was ever transmitted to the Commissioner of the General Land-Office, and no certificate was made or filed, and no other acts done as required by the 3d section of the statute of February 17, 1815.

This court has repeatedly held that, under the act of 1815, a claimant had no right to a patent either in law or equity until after compliance with the requisitions of the statute; it is conceded that the claimant never complied with these statutory provisions.

SIXTH.

Unless this court shall overrule itself in six carefully-considered cases, the Rector claim must fail. Those decisions relate to the same New Madrid act of 1815, and we make the following analysis:

1. Bagnell *v.* Broderick, 13 Pet., 436. Catron, J.

Ejectment for a section of land; Broderick, plaintiff, claimed title under a patent issued for the land under a New Madrid certificate to Robertson. The defendant set up an equitable title as follows: Robertson con-

veyed to him the injured lands, so that when the certificate was granted he was the legal representative for the claim, and executed the relinquishment of the injured lands; but Robertson was claimant of record, and the certificate was issued as usual in his name. Defendant made a written statement of entry of the land in dispute with the surveyor-general in his own name, but apparently took no further step under the law. Robertson somehow procured the patent, the copy of the plat and certificate of survey having been filed in the recorder's office as required by the law.

Defendant contended that showing the above facts established an equitable title that could be sustained against the legal title by patent in plaintiff. The court decided otherwise, apparently on the ground that defendant had not, by simple notice of entry to the surveyor-general, shown enough under the act to establish such an appropriation as would give him standing in court as claimant of an equitable title under this act. The court say: "Our opinion is, first, that the location referred to in the act is the plat and certificate of survey returned to the recorder of land-titles, because, by the laws of the United States, this is deemed the first appropriation of the lands," (p. 450.) Elsewhere the court state the requirements of the act, and announce the same conclusion as to the proceedings requisite to establish an appropriation, (pp. 447, 448.) The court go on to fortify their conclusion from the terms of the statute itself by stating that the practice of the Land-Office corroborated that view. This statement the claimant in this case vehemently contends to have been erroneous, and seeks to combat with evidence representing the conclusion of the court to rest only on their information

as to the practice of the Office, which, it is apparent, is but an incidental statement, whether correct or not.

2. Barry *v.* Gamble, 3 How., 32. Catron, J.

The same doctrine as to the time when lands become appropriated to the claimant under the New Madrid act is affirmed, but it does not appear that the controversy turned on that point, but on whether a valid location could be made on lands which had not been offered for sale, and that was decided in the affirmative.

3. Lessieur et al. *v.* Price, 12 How., 59. Catron, J.

This suit came up from the Missouri court, which gave judgment for Price on two grounds, one of them being that his title, by patent from the United States, was older than that of Lessieur from the same source. Lessieur's title was based on a New Madrid location, and it was claimed on his behalf that though his patent was of later date than the other, yet as the notice of location on the New Madrid certificate was filed with the surveyor-general, and the tract therein specified surveyed by the surveyor before the patent issued to the other side, that was a transfer to the New Madrid proprietor of title to the tract under the New Madrid act, good as against the United States and their patentee. It seems the judgment below was by a divided court, and it was questioned there whether the decision of the Supreme Court in the two cases last cited, on the subject of the requisites of an appropriation under the New Madrid act, was necessary to arrive at the decision then made. The Supreme Court notice this in their opinion in this case, hence the weight of this authority as a forcible reaffirmance of the doctrine of these cases as authoritative. The court go over the whole ground,

and put their decision squarely on the plain meaning of the law without regard to practice of any office, saying explicitly that the import of the law was not to be changed by the practice pursued in the surveyor's office. It is not worth while to quote from the opinion, as all of it on this point should be examined. See pages 73, 74, 75.

4. Hale *v.* Gaines et al., 22 How., 141. Catron, J.

This suit involved the matter of the present controversy. Gaines, claiming under the Belding pre-emption title, brought ejectment in the Arkansas court against Hale, who rested on the New Madrid certificate of Langlois, Hammond & Rector's application for location in 1819, and on the re-survey of 1838. He offered in evidence the Conway certificate of 1820, but the court rejected it. The Supreme Court, reviewing the facts, say as to the original application: "In 1818 the spring was in the Indian country, to which, of course, no public surveys extended, and as the act of 1815, providing for the New Madrid sufferers, only allowed them to enter their warrants on lands 'the sale of which was authorized by law,' the unsurveyed lands could not be legally appropriated, and of necessity the surveyor-general disregarded the application to have a survey made for Langlois, and thus the claim stood from 1818 to 1838." Again the court re-assert the doctrine of the cases before cited: "Until the survey on Langlois's claim was presented to the recorder of land-titles at St. Louis, and recognized by him as proper and valid, it could have no force, as this was the only mode of location contemplated by the act of 1815. So it has been uniformly held. (Bagnell *v.* Brodrick, 13 Peters, 436.

Lenure *v.* Price, 12 How., 9)." The court also refer to the acts of 1822 and 1843, and show that neither could benefit the New Madrid title in this case, the former barring the subsequent attempt to locate, and the latter not affecting the reservation act of April 20, 1832. Hence they decide that the New Madrid survey of 1838 of the Hot Springs was altogether invalid, and properly rejected by the State courts.

5. Rector *v.* Ashley, 6 Wall., 142. Miller, J.

Cross-suits to quiet title of lands near Little Rock, Ark. The legal title was in Ashley, unless it had been previously appropriated by proceedings under the New Madrid act, through which Rector set up a prior equitable ownership of the same land. Rector showed a New Madrid certificate issued to Henry Cockerham, an application dated October 30, 1820, to the surveyor general for location by O'Hara, as the legal representative of Cockerham, describing the land, but no evidence was given that it was ever filed in the surveyor's office, nor any to show from whence it was produced, though the Supreme Court, for the purpose of the opinion, considered it might be conceded that it was regularly filed, and that O'Hara had authority. A survey purporting to be under Cockerham's certificate, dated May 30, 1838, with a certificate of filing, then of June 16, 1838, by the recorder of land titles, appeared as a transcript from the records of the General Land-Office. The Arkansas court gave judgment for Ashley on the ground that the land had not been appropriated under the New Madrid act until after Ashley's title was fixed. The Supreme Court, after stating the facts, says: "The questions to be considered on these facts are, did these pro-

ceedings establish a right, in the parties who represent Cockerham, to the land covered by the survey, which would withdraw it from the category of *unappropriated* lands on which the Arkansas grant could be located. And if they did, at what point in the proceeding did this right become fixed? It seems to us that this court has already settled these questions in a manner which leaves nothing more to be said, unless we overrule its decisions." The court then quotes at length from Bagnell *v.* Brodrick, Berry *v.* Gamble, and Lessien *v.* Price, and proceeds to dispose of the main reliance of the claimant in this case, as follows: "But we are much pressed in the present case with the argument that the title here spoken of by the court is the legal and not the equitable title; and that inasmuch as the applicant has done all that he can do to make good his claim to the land, when he has deposited with the surveyor his certificate of loss, with a description of the land desired in exchange, he has thus acquired an equitable interest in the land so described, which the United States cannot divert by giving it to another."

But the rights of the claimant are to be measured by the act of Congress, and not exclusively by what he may or may not be able to do; and if a sound construction of that act shows that he acquired no vested interest in the land until the officers of the government have surveyed the land, and until that survey is filed in the office of the recorder, and approved by him, then, as claimant's rights are created by that statute, they must be governed by its provisions, whether they be hard or lenient. It seems to us clear, from the foregoing cases, that the court intended to decide that, until this was done, the claimant acquired no vested right to the land;

no title, legal or equitable. The court held, therefore, that the legal title of Ashley vesting on June 8, 1838, and the certificate of the recorder of land titles of the return of the Cockerham survey being dated June 16, 1838, the lands were not appropriated under the New Madrid act so as to affect Ashley's title.

6. ~~Morkay~~ MacKay *v.* Easton, 19 Wall., 619. Field, J.

Affirms the foregoing line of decisions, and adds: "It (the act) contemplated that there should be a concurrent investiture of title; that the title of the owners of the land injured in New Madrid County should pass to the United States, and that at the same time the title to the land located in lieu thereof should pass to the claimant, or rather the right to the title, for the strict legal title did not pass until the patent issued; and that this exchange of titles should take place when the claimant obtained his patent certificate, or the right to such certificate, and that he could not acquire until the plat of the survey was returned to the recorder of land titles. Until the plat was placed in the public depository of the territory of evidences of title issuing from the United States, there was no official recognition of the proceedings taken by the claimant which bound the Government."

It seems hardly necessary to present any further argument against the claim of Rector.

SEVENTH.

Clear, as it seems to us, that the Rector claim has no foundation in equity or law, the importance of this case leads us to a more extended review of the facts presented by the record.

The averments and matters requisite to establish title are set forth partly at the beginning, partly at the end, of the petition.

Note, as to this, an apparent defect in the chain of conveyances, so that only one-half of the property comes by deed to the claimant's ancestor. He tries to cure the defect by claiming a sort of title by prescription and also by a certain proceeding against the original proprietors of the other half in an Arkansas court by publication and decree on default.

In the opinion of the court, p. 579, at the bottom of the page, the court speaks of certificate 467, which is the foundation of the title, as though it might have been attacked by bill as erroneously issued or fraudulently obtained. This may have been because in McKay and Gitt's claim, (Record, pp. 445, 446,) a conveyance of the same 200 arpents from Langlois and wife to other parties than Rector's assignors was offered to be proved.

The petition contains the acts and proceedings of the several representatives of this title to obtain a location and perfect the grant; first, those of Story, then of Hammond and Elias Rector in 1819 and 1820, and finally of the claimant, after he became of age, in about 1838.

The object is to show that whatever was required by the New Madrid act of the proprietor to be done was done prior to July 16, 1820, and also that the claimant thereafter at all times prosecuted his claim with diligence, so if anything material to perfect the title failed to be done it was not by fault of the representatives thereof.

It contains averments of the acts of the defendant's agents in the premises; first, of the surveyor-general and deputy surveyor; second, of the departmental authorities of the Land-Office and the Attorney-General

through a series of years, as by their decisions and instructions controlling and affecting the action of the surveyor-general in the premises as alleged, and also the claimant in the prosecution of his claim.

The object seems to be to show that enough was done by the surveyor-general to perfect an equitable title in the proprietor, but that the perfecting of a legal title thereon was prevented by the invalid rulings and illegal proceedings of the superior authorities at Washington, or if an equitable title was not perfected, it was by reason of such rulings and proceedings, whereby the proprietor should not suffer.

The substance of the decisions and action complained of, so far as regards the attempt to obtain a location in 1820, seems to be: 1. That the surveyor-general was erroneously instructed by his superiors in Washington, under date of July 5, 1820, that lands were not authorized by law for sale until surveyed and laid out according to the rectangular system of surveys of public lands; and that New Madrid locations could not, under the act, be lawfully made on lands not so surveyed. For which reason the surveyor-general declined to entertain or proceed with the location on the Hot Springs lands, as yet unsurveyed. 2. Prior instructions of the Land Commissioner to said surveyor are also referred to, viz, of July 10, 1816, to the effect that New Madrid locations should be made on certain lands which, in March, 1815, had been ordered to be surveyed and prepared for sale; and also of April 15, 1817, in general, that lands which the President had not directed to be prepared for sale were not lands the sale of which "is authorized by law," and therefore not subject to locations under the New Madrid act. 3. Reference is also made to a decision of

the Secretary of the Treasury, (then in charge of public lands,) that lands in Missouri Territory, but not within the organized counties thereof, were not lands subject to pre-emption under the pre-emption act of 1814.

The other matters complained of seem to relate to the difficulties which the present claimant met with in prosecuting his right to a patent herein, arising from the before-mentioned rulings and others afterward made by departmental authorities affecting the subject of location of New Madrid grants, and they are in substance as follows: 1. That although Congress on April 26, 1822, passed an act to remedy the effect of the ruling as to New Madrid locations not made conformably with regular sectional divisions, and to legalize such locations, theretofore made, yet in 1825, on October 10, by an opinion of Wirt, Attorney-General, a new difficulty, or a new phase of the difficulty, was started by the word "is" in the expression, "the sale of which *is* authorized by law," being declared to mean "at the date of passage of the act," and not at the time of the survey or location, whereby all the lands in the southern part of the Missouri Territory, including the Hot Springs region, were held by the land-officers not subject to New Madrid locations, because at the date of the passage of the New Madrid act in 1815 the Quapaw Indian title thereto had not been extinguished, and was not until 1818, by treaty made in that year, and that this obstruction was interposed until, in 1843, Congress passed an act especially to remove it, and until it was also reversed by a counter-opinion of an Attorney-General in 1854. 2. That in the mean time, in 1832, April 20, Congress had passed an act reserving the Hot Springs and four sections adjacent from location, so that when he sought to take advan-

tage of the said act of 1843, he was baffled by an erroneous ruling that the intervening reservation act of 1832 deprived him of the benefit thereof. 3. He sets forth various matters in this connection, partly historical, to show the laws from time to time passed bearing on the subject, and the course pursued by land-office and other officers; partly argumentative, to show that the official acts were uniformly characterized by ignorance and error; and partly personal, to show that under the circumstances he did all that could be expected, and is not chargeable with any laches in prosecuting his right, nor with any mistakes attending the resurvey of the location and proceedings therein in 1837 and 1838.

The petition contains certain matters, apparently in anticipation of the defence, stating that the Supreme Court of the United States were mistaken in point of fact in holding that the practice of the Government was not to consider a location under the New Madrid act complete until the survey was returned to the office of the recorder of land-titles, and avers that the practice was otherwise. The act of April 29, 1816, (3 St., 325,) is claimed to have changed the mode of proceeding as fixed by the New Madrid act and various official acts, and alleged modes of proceeding are set forth to show that what was done in respect of this location was according to the settled practice in the local land-offices at the time, and that such practice was in accordance with the existing law.

The answer, in the nature of a general traverse, is at page 37 of the record.

STATEMENT OF THE ISSUE.

It is not easy to extricate from the mass of matters, relevant or otherwise, contained in the pleadings and testi-

mony of record, the precise controlling elements of the controversy. These may, perhaps, be best developed by considering the following propositions, viz: 1. What right, if any, of the claimant can be said to have been impaired in the premises? 2. By what action of what authority is the wrong charged to have been done, and what is proved as to such charge? 3. Is the action of that authority, right or wrong, revisable here? 4. If revisable, was the action right? 5. If the action was unlawful, is the claimant in a position, on that ground, to obtain the relief here sought?

First. What seems to be the extent of the allegeable injury? Rector says that unjustly the defendants withhold from him a patent for $170\frac{14}{100}$ acres of land, including the Hot Springs, to which he is equitably entitled under the New Madrid act, (3 St., 211.) That statute donates no land. It only authorizes exchanges. Rector has not shown that the defendants have taken his lands and now withhold the equivalent. (The instrument appearing at p. 306 of the record is not authenticated or proven so as to be admissible in evidence.) He shows no exercise by the defendants of any acts of ownership or of any description on or about his New Madrid lands from which it might be inferred that they have in fact taken title thereto. The statute, it is true, does not prescribe any form of passing the private title to the public, but it explicitly declares at what point in the proceedings the transfer of the title in point of law is concluded. The Supreme Court have also settled that question under the act, and it is no longer open to controversy. That point was confessedly never reached in the proceedings taken to perfect the claimant's acquisition of public land in exchange for his own. For aught that appears, the legal title of Langlois's New Madrid lands is in Rector still, if it ever was.

The utmost that Rector can claim seems to be that under the New Madrid act he went so far as to acquire an equitable title to certain public land sufficient to enforce conveyance to him of the legal title thereof, the consideration on his part being and having been at all times capable of transfer, and ready therefor on the part of the New Madrid proprietor since the first proceedings under the act.

If the doctrine laid down in six decisions of the Supreme Court may be considered settled, he cannot maintain that any title, such as is contemplated by the act to accrue on the fulfilment of its conditions, has ever been vested in him. He can only insist that the New Madrid proprietor, whose legal assign he is, had a right to obtain such a title, and failed therein without fault on his part, but by the fault in the premises of the authorized representatives of the defendants. The injury then would be that the defendants wrongfully prevented him from obtaining an equitable title, which, under the act, he had a right to obtain, and for the obtainment of which the New Madrid proprietor had done everything which by the act was made a condition-precedent on his part.

Second. What is the wrongful action of defendants complained of, and by what authorized representative of theirs was it done?

Rector charges that his father's brother, William Rector, who was at the time in question surveyor-general for the Territory of Missouri, was the unwilling instrument of the Secretary of the Treasury and the Commissioner of the Land-Office in debarring Elias M. Rector, the legal representative of the Langlois claim, of his right, and that his course in the premises was in conse-

quence of certain instructions issued by said superior officers.

The original wrongful action charged is, that a certain alleged legal and valid survey, which had been made under the direction of said William Rector for the purpose of locating the Langlois claim under the New Madrid act, on the Hot Springs, and returned by the deputy surveyor to said Rector, was not, in consequence of said instructions, received by him as a legal and valid survey for the said purpose, and was not filed and recorded as such by him in his office.

The extent of the proof of the charge will depend somewhat on the admissibility in evidence of some of the matter introduced by the claimant.

It will suffice to state briefly the nature of it in general. There is but one living witness, F. R. Conway, (Record, p. 344,) examined Oct. 28, '72; 73 years of age, and was a clerk in the office of the surveyor-general, Rector, in 1819, 1820; was present and remembers when Elias M. Rector presented his application for location. Knows that his brother James A. Conway was directed by Wm. Rector to make the survey; that his brother made and returned it, and was present in the office with his brother the surveyor-general, and Elias M. Rector, when the survey was returned to the office and approved. Thinks Elias M. Rector paid for the survey, but has no personal knowledge as to that. A certified copy is produced from the office of the custodian of the archives of the United States surveys in Missouri, of so much of a certain schedule kept on file in that office, called Exhibit F, (New Madrid claims,) as relates to the Langlois certificate No. 467. See Record, p. 360. On this, under the head "Number of survey," appears 2903, (the alleged

turn of that survey. The third is dated July 5, 1820, and might have reached the surveyor about the time of the alleged return, but there is no evidence on the subject.

After the transaction of July, 1820, there is no pretence that any movement was made on the part of those interested in this claim until about 1838. Complaint is freely made of the acts and decisions of the departmental authorities from that time forward, but it does not appear how the cause of action, as based on the survey of 1820, could be affected by any proceedings at that time.

But, while claiming that Rector does not make out his charge that his right was infringed by any official misfeasance, let it, for the sake of argument, be conceded that, in accordance with general instructions of the nature charged, the surveyor felt bound to refuse to accept the Conway survey, dated July 16, 1820, as evidence of a valid location under the New Madrid act.

Third. Is the alleged official action in the premises revisable here?

The petition concedes that the surveyor was bound to accept and carry out the instructions of his lawful superiors, so that the real issue is, has the Court of Claims or this court authority in this case to revise the action of the authority which, in and before 1820, had the right of decision and instruction in questions pertaining to the alienation of the public lands?

On this point the court below said, (record, p. 582:) "The alienation of the public lands has always been exclusively confided to the officials of the Land-Office. Upon well-understood principles, a power confided to a special tribunal can neither be reviewed, nor enforced,

nor reversed by courts of law or equity as between the Government and those seeking to become purchasers or grantees. The final action of the Land-Office has always been regarded as final by the judiciary. Its decisions, whether rightful or wrongful, have never been reviewed either to enforce sale by mandamus or prevent it by injunction."

In Maguire *v.* Tyler et al., 1 Black, 195, the Supreme Court said: "That the General Land-Office has, from its first establishment, in 1812, exercised control over surveys generally, is not open to discussion at this day."

The Court of Claims say, further, that the courts will collaterally examine the action of the Land-Office in two cases, neither of which would appear to include the circumstances of this case. (Record, p. 582.)

It will have to be claimed and proved, therefore, in order to maintain this action, that the act giving these courts jurisdiction to hear and determine these cases in the form and under the rules pertaining to suits in equity gave them more extended authority to revise the judgments of the authorities of the Land-Office in the premises than courts of equity would otherwise have.

Fourth. Assuming, however, the amplest power of revision, the question, then, is, was the official action lawful?

That action, so far as regards the proceedings prior to the alleged return of the survey 2903, was, in substance, the decision and enforcement thereof in all cases under the New Madrid act that New Madrid locations could not lawfully be made on public land in the Territory before the same had been surveyed in the manner prescribed by law, because it was held, under the general course of legislation respecting the alienation of public

lands, that a sale thereof was not authorized by law prior to such survey.

This decision rested, of course, on a construction of the provision in the New Madrid act restricting the location to public land in the Territory, "the sale of which is authorized by law," and that construction was based on the doctrine that the New Madrid act belonged to the general system of land legislation of the country, and that its provisions were, therefore, to be interpreted as in accordance with the established rules and policy of that system. This would seem too plain for argument, but the claimant makes a labored effort to maintain, on the contrary, that, subject only to exceptions specially made by statute, such as salt springs and private claims, the entire body of public land in the Territory was open to location, without regard to its condition as surveyed or otherwise. His main argument, indeed, is, that at the date of the passage of this act no lands had been surveyed according to the rectangular system, nor had any order for such public survey then been issued. The objection is merely specious. The act itself contains the most conclusive evidence on the subject in its direct reference to the precise quantities of 160 acres and 640 acres, the well-known sectional divisions of the public system of survey. The order for survey of a sufficient amount of public land to meet the requirements of this act speedily followed its passage, and it does not appear that claimants experienced any difficulty from the want of surveyed lands for location.

Congress in 1822, April 26, (3 St., 668,) recognized the propriety of this construction by substantial affirmation of it for the future, while relieving past locations irregular in that respect from the condition of illegality which called for this confirmatory act.

The courts have always maintained the same view, as may be seen by reference to Bagnell *v.* Broderick, Hale *v.* Gaines, and other cases elsewhere cited.

The next charge of official misfeasance is that in October, 1851, the Secretary of the Interior decided adversely to an application for a patent made by the claimant in 1850, on the ground, among others, that under the New Madrid act a valid location could be made only on lands the sale of which was authorized by law at the date of passage of the act.

It is needless to discuss the correctness of this alleged decision, since the claimant was not in a position to raise the issue, as will presently appear.

There are some other trivial complaints, which are unworthy of consideration. We insist that lawful authority is shown for the official action throughout. But, be that as it may, we further insist—

Fifth. Neither Elias M Rector, in his life-time, nor the claimant, as his successor in interest, can be regarded as entitled to the benefit of the equitable doctrine invoked.

The claimant, in such case, must show not only that he did all which the law required of him, but also, by protest or other indicative action, that he did not acquiesce in or submit to the action for which he seeks to hold the defendants to account.

There is no scintilla of evidence that Elias M. Rector ever protested or even complained of the action of his brother or of any other official concerning the rejection of Conway's survey. He lived more than two years after July, 1820, and until after the passage of the act of 1822 to confirm a certain class of invalid New Madrid locations, yet there is no evidence that he made any

effort to prosecute or perfect his claim. He seems to have accepted the decision as just, and let the matter rest there, awaiting, perhaps, the time when, by extension of the public survey over the region of his proposed location, the obstacle to a valid location would be removed.

His inaction and that of his brother, the surveyor, who became his executor on his decease, in August, 1822, during the year limited by the act of April 26, 1822, was fatal not only to the desired location, but to the claim, the act providing (§ 2) that "all such warrants shall be located within one year after the passage of this act, in default whereof the same shall be null and void." Nor was this the only bar, for in 1832 the springs and four sections about them were reserved from entry, so that when this claim, which had lain dormant from 1820 to 1838, was then revived by the claimant, he was met by these two insurmountable objections, which continue to resist his attempts to obtain that which was never his right.

EIGHTH.

The title of Percifull and the title of Belden rest exclusively upon the pre-emption acts. They seem to have no real basis in law, and they present no grounds for equitable action by the court. The questions involved are so ably treated by the court below and the points presented are so thoroughly examined that I need only repeat what the court have said.

"*I.—As to the title of John Percifull.*

"It rests exclusively upon the *Act 12th April*, 1814, (12 Stat. L., p. 121, § 5;) his previous inhabitancy and cultivation and an alleged foothold upon the property

maintained from that time to the present by himself, his tenants, his heirs, and their assignee. No entry has ever been allowed and no certificate has ever issued. The first attempt to enter or purchase under the act was in 1838, after the *Reservation Act, April*, 1832, had passed, but before the land had been offered for sale, though after public surveys had been made.

"As against the Government, the facts are these:

"1. The widow of Percifull, in 1838, applied to enter and purchase the lands under the act of 1814, and filed her proofs to establish her right of pre-emption. On the 27th September, 1838, the receiver and register of the land-office in Arkansas rejected the application, upon the ground that the land sought to be entered had been located by a '*New Madrid certificate, No.* 467, *in the name of Francis Langlois.*'

"2. In 1843 she again made application to enter and purchase the lands under the same act, and filed further and additional proofs. She also made tender of $200 in gold coin, the amount of the purchase-money of the quarter-section. This application was also rejected, on the following grounds: First, that the land claimed was not ceded to the United States by the Quapaw Indians until 1818, and was not subject to pre-emption under the act 1814; second, that the land was reserved from entry or sale by the *Reservation Act, April 20th*, 1832; third, '*that, admitting the validity of a settlement, the claimant, in her proof herein, has failed to make out her case under the* Act 12th April, 1814.'

"3. In 1850 the heirs or representatives of Percifull made further proof of their right to enter the lands. On the 10th of February, 1851, the receiver decided that Percifull '*did actually inhabit and cultivate the tract of land*

above described on and prior to the 12th day of April, 1814,' and '*that his legal heirs or representatives are entitled to enter the same under the provisions of said pre-emption laws of 12th April*, 1814, *at the minimum price of* $1.25 *per acre.*' But the register on the same day decided '*that John Percifull did not actually inhabit and cultivate the southwest quarter of section* 33, *in township* 2 *south, of range* 19 *west, prior to the passage of the* Act 12th April, 1814.' These decisions were returned to the General Land-Office. On the 10th October following, the Secretary of the Interior decided that the right of entry was barred by the *Reservation Act*, 20*th April*, 1832, and therefore that the claim preferred was without legality.

"4. By these proofs it appears that John Percifull in fact resided in 1814 on the Wachita, seven miles distant from the Hot Springs, where he owned a house and cultivated a farm, which was also a part of the public domain, but that he had erected a house and cultivated a garden at the springs, doing business there in summer during the season of visitors, and returning to his home in the autumn. It also appears that the house or houses which he owned at the springs he leased from time to time to various parties till 1833, after which he resumed possession. His inhabitancy at the springs in 1814 does not appear to have been exclusive, but to have been shared by the visitors who came from year to year for the purpose of using the waters; neither does he appear to have been the first settler, nor to have inhabited and cultivated until the place had become a summer resort for invalids.

"Upon these facts, the claimant is understood to contend that the *Act* 1*st March*, 1843, (5 Stat. L., p. 603, § 3,) removed all objections to his entry, and that under

the *Hot Springs Act* 1870 (16 Stat. L., p. 149) this court is invested with equitable power to take the place of the land-office, and complete the proceedings which constitute a sale.

"*II.—Of the title of Ludovicus Belding.*

"This title rests upon the *Act 29th May*, 1830, (4 Stat. L., p. 420,) and upon the actual possession of a house at the Hot Springs on that day, and the cultivation of a part of the quarter-section during the year 1829, by Ludovicus Belding. An entry is also relied upon which was allowed by the Secretary of the Interior in 1851.

"As against the Government, the facts are these:

"1. In 1839 the heirs of Belding applied for leave to enter the land, and offered proofs and showed a right of pre-emption under the *Act 29th May*, 1830, (4 Stat. L., p. 420.) No immediate decision was rendered on this application, but on the 23d October, 1850, the General Land-Office instructed the land-office in Arkansas to have a rehearing of the claim. Upon this rehearing the receiver, on the 13th February, 1851, decided that Belding '*was in possession of the Hot Springs on the 29th May, 1830, not in his own right, however, but as a tenant under and by virtue of a lease from John Percifull, who, it is shown, claimed said springs and had possession of them;*' and that Belding cultivated '*a portion of the land embraced in the quarter-section on which the Hot Springs are situated, but that he only acquired the right to cultivate said land by means of said lease from John Percifull to him;*' and that '*all the improvements which said Belding put on said quarter section during the time he held possession were made in accordance with an express agreement between him and Percifull that he should do so, and*

on the consideration of which Percifull leased the springs to him; and that said improvements were made for the use and benefit of said Percifull, and not Belding;' and that '*the purchase of the Miller cabins was made by Belding for the use and benefit of John Percifull, and not for his own use and benefit, nor longer than for the term of his said lease;*' and that '*the heirs and legal representatives of said Ludovicus Belding, deceased, are not entitled to enter said land by pre-emption under the provisions of the act approved 29th May*, 1830.' On the 22d March, 1851, the register decided that '*it was clearly proven that the said Ludovicus Belding did cultivate said southwest quarter of section* 33, *in township* 2 *south, of range* 19 *west, in the year* 1829, *and that he had possession of the same on the 29th May*, 1830, *as required by the first section of the pre-emption law approved 29th May*, 1830.' The Commissioner of the General Land-Office, on the 26th August, 1851, decided that Percifull had no power to lease the public lands, and that the inhabitancy inured to the benefit of Belding, but he reserved a final decision upon the application. On the 21st November, 1851, the Secretary of the Interior, Mr. Stuart, on appeal from the Commissioner of the General Land-Office, decided that it would be '*proper and in accordance with precedent*' to permit the heirs of Belding to make an entry under the acts of 29th May, 1830, and 14th July, 1832, as requested by them, which request stated that such entry should be, '*in order that they may be placed in a proper position for the assertion of their rights hereafter in the courts,*' and declared that they should not ask for a patent. The Secretary of the Interior further said in his decision, '*said entry will remain subject to the same power of revocation and control by the General Land-Office and this De-*

partment as may be lawfully exercised over any ordinary entry. The Government will still hold the power of protecting its own rights, while the claimants will simply be placed in a position to contest the adverse claims of others to the same land.' Under and in pursuance of this decision the register and receiver of the land-office in Arkansas entered the land in favor of the heirs of Belding, and issued the usual certificates, and they accepted and received from them the sum of $200 purchase-money, which is still retained by the Government.

"On the 7th June, 1860, the Secretary of the Interior, Mr. Thompson, decided that the entry allowed by his predecessor, Mr. Stuart, in favor of Belding's heirs, was forbidden by the *Reservation Act 20th April*, 1832, and he directed that the certificate be canceled and annulled. No further or formal cancellation was ever made, nor was the purchase-money ever refunded to the pre-emptors.

"The objections of the officers of the Land-Office to this title are believed to rest exclusively upon the reservation act, with the exception of the first decision of the receiver, who held that his occupancy was in fact an occupancy for his lessor, Percifull.

"Upon these facts the claimants are understood to contend that Belding acquired a right to pre-empt under the *Act 29th May*, 1830, which was revived and restored to him by the *Act 14th July*, 1832, notwithstanding the *Reservation Act 20th April*, 1832. It is also understood that they contend that the reasons assigned by the Secretary of the Interior in 1851 for allowing their entry cannot be considered as legal conditions affecting its validity, and that the subsequent revocation by a succeeding Secretary in 1860 was void.

"Before proceeding to the consideration of the respective cases, it may be desirable to inquire as to the authority and limitations under and within which this court must act.

"The alienation of the public lands have always been exclusively confided to the officials of the Land-Office. Upon well-understood principles, a power confided to a special tribunal can neither be reviewed, nor enforced, nor reversed by courts of law or equity. As between the Government and those seeking to become purchasers or grantees, the final action of the Land-Office has always been regarded as final by the judiciary. Its decisions, whether rightful or wrongful, have never been reviewed either to enforce a sale by mandamus or prevent it by injunction. But as these decisions have necessarily lacked many of the satisfying elements which are the essentials of a judicial judgment, the courts of the United States have devised and established two collateral principles in furtherance of the maintenance of legal rights. The first of these is, that when a pre-emption purchaser has paid his money and received from the officials of the local land-office his certificate of pre-emption, he thereby acquires an equitable estate, hereditable, devisable, assignable. The legal estate remains in the Government until the patent issues, but the property becomes severed from the public domain. After such property becomes so severed, notwithstanding that the legal title remains in the Government, it is no longer the property of the United States, nor subject to a reservation by Congress. Though not conveyed, it is nevertheless sold. The second of these principles is that, although the action of the Land-Office is conclusive as between the Government and the purchaser, it does not affect the rights of

third persons. Thus, though the purchaser has been decreed by the Land-Office to be entitled to the property, and has been invested with the legal as well as the equitable title thereof by patent, yet nevertheless, in contemplation of the judiciary, he takes only as trustee for the rightful owner—that is to say, for a more rightful purchaser. Thus collaterally the action of the Land-Office may be reviewed as between two parties asserting conflicting rights, provided always that the property has been severed from the public domain.

"In 1870 the Hot Springs of Arkansas had been the subject of legal contention for thirty years, and every conceivable method which professional ingenuity could devise had been resorted to to obtain, directly or indirectly, the adjudication of a court upon the rights of the parties. No one had received a patent or pretended to have acquired the legal title, but each had again and again insisted that he was the equitable owner of the property. At the same time the interposition of Congress had been invoked for a confirmation of one or the other of the titles. With such precedent facts existing, Congress passed the '*Act in relation to the Hot Springs reservation in Arkansas*,' 11*th June*, 1870, (16 Stat. L., p. 149.) It provides that '*any person claiming title, either legal or equitable*,' may institute in this court '*any suit that may be necessary to settle the same*;' that such suits '*shall be conducted and determined according to the rules and principles of equity practice and jurisprudence in the other courts of the United States*;' that this court shall be '*invested with the jurisdiction and powers exercised by courts of equity so far as may be necessary to give full relief*;' that separate suits, asserting conflicting rights '*shall be consolidated and tried together*,' the court being directed

to '*determine the question of title*' and to grant '*all proper relief as between the respective claimants as well as between each of them and the United States;*' that if the final decision of the court be in favor of the defendants, the court '*shall order such lands into the possession of a receiver,*' and, if its decision be in favor of a claimant, it shall '*proceed by proper process to put such successful claimant in possession,*' and that upon the filing of its decree with the Secretary of the Interior, '*he shall cause a patent to be issued to the party in whose favor such decree shall be rendered.*' We do not understand this statute to cede any interest of the United States, or to confer on others any right, legal or equitable. The equity to which it alludes is not a natural or moral equity, to be measured by the discretion of this court, but simply that equity which springs from the possession of a legal right. The case contemplated by the statute is that of a man in possession of lands under a contract of sale, but who has not received a deed from the vendor. He goes into a court of equity to obtain a decree for specific performance. If it be found that he is the equitable owner, the court compels the execution and delivery of the deed; if it be found that his contract of sale is invalid, the defendant obtains a decree, and, in this case, is to have restored the possession. There is nothing in the act which substitutes this court in the stead of the officers of the Land-Office to perform any duty which they may have left undone; neither is there in the act anything which, as against the Government, authorizes the court to review their proceedings and say that they are wrong. After the court has reached the point of determining that the equitable title has passed to one or the other of the claimants, then, indeed, it becomes its duty to decree

specific performance against the Government, or to go behind the action of the Land-Office and ascertain which of the parties is the rightful purchaser. But until that point is reached it is possessed of no more power, aside from jurisdiction, than any other court of the United States. In other words, the act is strictly remedial and jurisdictional, and its characteristic essentials are, first, that it confers jurisdiction as against the Government; and, second, that it enables all of the contending parties to have their conflict settled by a single decree.

"The first pre-emption title, that of John Percifull, is founded, not so much upon what the officials of the Land-Office have done as upon what they have left undone. It is claimed that, on the one hand, he has done everything which the law required should be done to vest in him the right of acquiring title, and, on the other hand, that the officers of the Government have evaded the obligations imposed upon them by law, and have erroneously refused to confer upon him the evidence of his legal rights. Waiving the question of jurisdiction, let us inquire how far this assumption of title can be sustained.

"It has been the settled land-policy of the Government, so far as titles acquired by purchase and sale are involved, that the public lands should be first surveyed upon a strict mathematical system of ranges and sections, which is founded upon astronomical observations, and almost entirely disregards the irregular formations of natural boundaries. It has also been its policy that the public lands shall not be sold until, after being thus surveyed, they have been publicly offered for sale. Besides this strictly legal policy, which contemplated a survey and public offering to sell, and a sale, there has been

a parallel policy, founded upon license and usage rather than upon express provisions of law. This policy has permitted the settler to go upon the public lands at any time, to occupy and to cultivate, but to do so at his own risk. On the one hand he acquired no rights whatever; on the other, he was not prosecuted for trespass. As these settlers have pushed out beyond the region of surveyed lands and beyond the confines of civilization, founding homes where they were legally trespassers, the legislative power from time to time has come to their aid by passing what are generally known as pre-emption acts. These pre-emption acts, however, conferred no vested rights, for the power of refusal to sell still rested in the Government, and pre-emption meant nothing more than the right to buy, should the Government elect to sell; the privilege of pre-emption going merely to the exclusion of all the world as competing purchasers. If the Government should never elect to sell, the settler would be no better than though the pre-emption act had never passed. But in course of time the lands would be surveyed and offered for sale, and then, if no governmental reservation intervened, the occupant would become the first and exclusive purchaser. It was inevitable that this should be the policy of the Government if it was to retain any control over its own lands; for it was not omnipresent, and, until the public surveys were made, could possess no specific knowledge of the lands which it should retain. If mere settlement before survey constituted a sale, it was inevitable that the public lands would be alienated at the will of any individual who chose in this manner to become a purchaser. The pioneer, by going on the unsurveyed lands, obtained the

benefit of an option as against other men, but he also ran the risk of never acquiring title for himself. The Government forebore to hold him in damages for his trespass, and he placed himself without remedy against the Government for his imprudence. The public survey, therefore, was necessary to inform the Government whether it would sell or not, and until this public survey was made and the discretion of the Government to sell exercised, the officials of the Land-Office were without authority to confer rights upon purchasers, and acted in the strict line of their duty when they refused to allow entries upon such lands to be made.

"It has also become a settled principle with our courts that lands which have been offered for sale may be reserved from sale by Congress at any time before sale is made. When the officers of the Land-Office have issued their certificates and received the purchaser's money, the land is severed from the public domain. Thereafter, if the sale was legal, neither Congress nor the Executive has power to undo what their agents have done. But until then the right of reservation is complete. It may work individual injustice, but it is a power which cannot be questioned. The case is that of a man whose agents, duly authorized to sell his lands, offer them for sale, and hold out inducements and give assurances. But so long as they enter into no binding contract, the would-be purchaser acquires no rights in the land, and the owner may withdraw it from the market at his pleasure. Under the pre-emption act, 1814, the agents of the Government were never authorized to sell this property. Before such authority was given, the owner decided that it should not be sold. Percifull, therefore, never bought. He at best only

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placed himself in a position where he might buy if the Government ever decided to sell. His expectations never reached the result of a valid contract, and his representatives possess no title, legal or equitable."

"In this case much has been said about the natural equity which Percifull acquired, and about the intent of Congress, through the Hot Springs act of 1870, to give legal effect to this equity. So far as the statute is concerned it is not perceived, as between these contending parties, the claimants, and the Government in the character of defendant, that it confers a single interest or waives a single right. At the very threshold of the statute it is announced '*that any person claiming title, either legal or equitable, to the whole or any part of the four sections of land constituting what is known as the Hot Springs reservation, &c., may institute against the United States in the Court of Claims, and prosecute to final decision, any suit that may be necessary to settle the same.*' This provision is conditional upon our jurisdiction. The party must claim '*title*,' which may be 'either legal or equitable,' and the suit must be one '*necessary to settle the same.*' If it is not a '*title*,' '*legal or equitable*,' the court is without jurisdiction to entertain his suit. The statute is strictly remedial. It gives a remedy for the assertion of a right, but it makes no grant on the part of the Government, and waives no right which the United States as defendants possess.

"But, aside from this construction of the statute, which as a matter of law may or may not be right, we are unable to perceive as a matter of fact that this claimant possesses any natural or moral equity which in any event would entitle him to the assistance of a court of equity. The pre-emption act, which is the founda-

tion of the supposed right, was in favor of one who at the time of its passage had '*actually inhabited and cultivated a tract of land.*' At the time when he is asserted to have acquired his right of pre-emption John Percifull actually inhabited and cultivated another tract of land. He came to the Hot springs to carry on a business there, precisely as hucksters go to our fashionable summer-resorts to carry on their business during the season. When he first inhabited the springs they were already inhabited by invalids, who came there for the restoration of health. His occupancy was as transitory as theirs, save that a constantly-recurring business brought him back from season to season. The policy of the Government was in aid of those who went out into the wilderness to subdue it, and to make ordinary homes and to pursue ordinary avocations. It was a general policy, designed for general purposes, for those who actually inhabited and cultivated, and not where the cultivation and the inhabitancy were both nominal, or at best technical. The laws upon this subject have always contemplated a general policy, and have never been designed to favor those whom chance or sagacity led to some exceptional spot. There could be no general policy designed to cover exceptional cases. The Hot Springs were as exceptional as the salt-springs and lead-mines excepted by the act 1807; and if through the ignorance and heedlessness of legislation the terms of such general reservations were not accurate enough to cover the Hot Springs, it is a technical defect in the statute, which does not create an equity in the claimant.

"The second pre-emption title, that of Ludovicus Belding, is also without those merits which would commend it to a court of equity. Its supposed merits have

been pressed upon the court with unusual ability and zeal, and we do not doubt that long contemplation of the pre-emption laws, and the sight of other men acquiring by their machinery a title to other property, and the protracted contest and enormous outlay which have gone on in the way of litigation, have brought both counsel and parties to the sincere conclusion that their case is a hard one, which must awaken sympathy if not procure redress. But while the claim of Percifull has some of the attributes of a first settler, the title of Belding has nothing whatever to awaken sympathy. He entered upon the property after it had become a well-known resort in Arkansas, as well known as Saratoga was in New York, or the Sulphur Springs in Virginia. A small village shared the occupancy with him, and his business was selling groceries to those who were as much first settlers as himself. His occupancy was not in his own right, for he held in the simple character of tenant, acknowledging the rights of his landlord, who was John Percifull; and, from the time he entered until the time he vacated, claiming nothing more. He declared by a written instrument his obligation '*to deliver all and every part of the buildings and improvements at said Hot Springs, that I have or ever had, unto John Percifull, if he demands the same;*' and '*I have no pretension to the improvement of said springs except under the claim of the said John Percifull.*' His occupancy and cultivation in the year 1829, and his possession on the 29th May, 1830, were an accident of time, for he vacated the premises soon after the act took effect. In his life-time he certainly never supposed that he could assert a right to this property. After his death it would seem as though some one had taken the statute in one hand and had run

down the list of occupants with the other until he found a resident who could nominally comply with the conditions of the act. What is asserted, therefore, on behalf of his heirs is not an equity, but the stringent application of a legal technicality, which is this:

"The *Act 29th May*, 1830, under which the Belding heirs claim, provided '*that every settler or occupant upon the public lands prior to the passage of this act, who is now in possession and cultivated any part thereof in the year* 1829, *shall be, and he is hereby, authorized to enter*,' &c., '*any number of acres not more than* 160,' '*provided, however, that no entry or sale of land shall be made under the provisions of this act which shall have been reserved for the use of the United States*,' &c. At that time the Hot Springs had not been reserved; and if Belding were an occupant and cultivator and possessor within the intent of the act, and if the lands had been surveyed, he would have been entitled, apart from the prior rights of others, to pre-empt this quarter-section. But the statute further provided '*that this act shall be and remain in force for one year from and after its passage*.' During that year Belding made no entry, and under that act his right expired. But another act reviving the right was passed. Congress, however, in the mean while, had passed the *Reservation Act*, 20*th April*, 1832, which in express terms provided that the Hot Springs '*shall be reserved for the future disposal of the United States, and shall not be entered, located, or appropriated for any other purpose whatever*.' The same Congress then, on the 14th of July following, passed the supplemental act providing that persons '*entitled to a pre-emption according to the provisions of the act of* 29*th May*, 1830,' '*and who have not been or should not be enabled to make proof and enter the same*

within the time limited in said act in consequence of the public surveys not having been made and returned,' &c., *'shall be permitted to enter the said lands, on the same conditions in every respect as are prescribed in said act, within one year after the surveys are made,'* &c. The Belding heirs complied with the conditions of this act. They entered or attempted the entry of the land within one year after the surveys were made, and they claimed, as they still claim, that this act took the Hot Springs out of the reservation act, and was a '*disposal*' of them within its meaning.

"We cannot accept this construction of the statutes. If the three acts be *in pari materia*, and are to be read together, then, at the time that Belding's heirs sought to effect an entry, they would read as follows: That every settler on the public lands in 1829 shall now, in 1838, have the right to enter, &c., provided that no entry shall be made upon lands which have been reserved for the use of the United States. Nor shall the right of pre-emption, contemplated by this act, extend to any land which is reserved from sale by act of Congress, (*Act 29th May*, 1830, § 4,) and provided further that the Hot Springs shall be reserved. The rules for the construction of statutes have been applied to this case, with great ingenuity and considerable effect, to show that the third statute was a 'disposal' within the meaning of the second; but the controlling rule which must govern courts in the construction of statutes, and which is much more applicable to statutes as carelessly drawn as those of the United States, is, that they shall be construed according to the true intent and will of the legislative power. As has been said, the same Congress passed the two acts. The first reserved the Hot Springs '*for*

the future disposal of the United States,' and expressly forbade that they should be "*entered, located, or appropriated for any other purpose whatever.*' These cond, passed three months later, allowed certain persons to make proof who had not been able to make it within the time limited by the act of 1830. But when this Congress looked into the act of 1830 they saw that it was expressly written down upon that act that entries and sales were not to be allowed upon land reserved for the use of the United States, and that the right of '*preemption contemplated by this act*' should not extend '*to any land which is reserved from sale by act of Congress.*' The supplemental act did not repeal the reservation act, in terms nor by implication. Can it be believed that the same Congress which passed both intended, through mere rules of construction, to undo by implication what they had expressly done by statute, or to allow a settler who had acquired no legal rights whatever to perfect his title by means of the payment of $200 to that which had been deemed of so much importance as to be worthy of express statutory reservation? Unquestionably the same Congress never intended to reserve and to give away, to undo indirectly what it had just done directly. The act of revival must be applied to the original act as if the intervening statute had worked a vested right in favor of a third person, which is the Government in its corporate or proprietary as distinguished from its legislative character.

"As has already been shown, these claimants also predicated their title upon the entry allowed at their special request, and for a particular purpose, by Mr. Secretary Stuart. It is certain that while that entry may have given a technical legal right, it imparted no equity

to the case of these claimants. Obtaining it through the express declaration that it should not be used against the Government, and then seeking thus to use it on the technical ground that the representatives of the parties and the purpose of the Secretary cannot control his action, is not a foundation on which to place an appeal to the favorable consideration of a court of equity. It may be questionable whether the Government would not have had a right to file a cross-bill for the purpose of setting aside the entry as fraudulently obtained, but we may lay that question aside under the construction we have given to the statute. The entry was illegal because the Secretary was forbidden to allow it. The reservation act bound him and the parties equally, and they could take nothing by his violation of the statute. Our conclusion is that these claimants have no title, either legal or equitable."

EDWARDS PIERREPONT,
Attorney-General.

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Cession of Northwest Territory to United States by State of Virginia. 1783.

Act providing for survey for sale on a rectangular system. 1785, May 20.

Act creating office of surveyor-general for Northwest Territory, &c. 1796, May 18, 1 St., 464.

Treaty of cession of province of Louisiana by France to United States. 1803, Apr. 30.

Act erecting said ceded province into Orleans Territory, (now State of Louisiana,) and District of Louisiana, including all the rest of cession. 1804, Mar. 26, 2 St., 283.

Act extending powers, &c., of surveyor-general to said district of Louisiana, provides for deputies and a principal deputy. 1806, Feb. 18, 2 St., 352.

Act providing for survey and sale of public lands in district of Louisiana, under direction of the President. 1811, Mar. 3, 2 St., 665.

Act organizing the district of Louisiana into a Territory by name of Missouri Territory. 1812, June 4, 2 St., 743.

Act for relief of sufferers by earthquake in New Madrid County, Missouri Territory. 1815, Feb. 17.

Instructions of Commissioner of Land-Office to surveyor-general, concerning survey of certain lands in Missouri Territory. 1815, Mar. 23.

Instructions of Commissioner of Land-Office to surveyor-general, concerning survey of certain lands in Missouri Territory. 1815, Mar. 24.

Instructions of Commissioner of Land-Office to surveyor-general, concerning survey of certain lands in Missouri Territory. 1815, Mar. 27.

Surveyof 5th principal meridian in Missouri Territory commenced, and completed December 28, 1815. 1815, Oct. 27, Rec. 3055.

Instructions of Commissioner of Land-Office to surveyor-general, concerning survey in Missouri Territory. 1816, Oct. 6.

Subdivisional surveys commenced in Missouri Territory. 1816, Rec., 305.

Act creating new office of surveyor of Illinois and Missouri Territory, &c., (claimed to affect the New Madrid act.) 1816, Apr. 29, 3 St., 325.

1816, July 10. Instructions of Commissioner of Land-Office to surveyor-general as to location of New Madrid grants.

1817, Apr. 15. Instructions of Commissioner of Land-Office to surveyor-general as to location of New Madrid grants.

1818, Aug. 4, Rec., p. 494. Certificate of record of proof of injury to lands of Langlois.

1818, Aug. 24, 7 St., 176. Treaty extinguishing Indian title to lands (including Hot Springs) in Arkansas.

1818, Nov. 10. Langlois executes power of attorney to Story to locate and do all things requisite, &c.

1818, Nov. 26. Recorder of land-titles issues, in name of Langlois, certificate 467.

1819, Jan. 4. Story assigns certificate 467, &c., to Samuel Hammond.

1819, Jan. 27. Hammond and Rector file application with surveyor-general to locate in Hot Springs.

1819, Feb. 19. Hammond and wife convey to E. Rector undivided half of certificate, &c.

1819, Mar. 2, 3 St., 493. Act organizing southern part of Missouri Territory as Arkansas Territory.

1819, July 12. Langlois and wife convey to Story said 200 arpents in New Madrid County.

1820, Mar. 17. Act authorizing appointment of land-officers for district of Lawrence, Arkansas Territory, (including Hot Springs.)

1820, Apr. 24. Act making further general provisions as to sale of public lands.

1820, May, June, July, Rec., p. 570. The Attorney-General and Secretary of the Treasury decided that locations of New Madrid warrants could only be made upon public lands which had been surveyed and offered for sale, and that the locations must conform to the sectional lines of the public surveys. Instructions to this effect were issued to the officers of the land-office.

1820, July 16. Date of alleged plat and survey by Conway under certificate 467.

Letter of Commissioner of General Land-Office to surveyor-general concerning prior instruction.	1820, Sept. 2.
Story conveys to Hammond and Rector certificate 467.	1821, Feb. 24.
Lands about Little Rock, Arkansas Territory, surveyed.	1821, Nov. 20.
Act to confirm certain New Madrid defective locations, and limiting time, &c.	1822, Apr. 26, 3 St., 668.
E. Rector died leaving will dated August 9, 1822. William Rector an executor.	1822, Aug. 20, Rec., 286.
President directed sale of public lands south of Arkansas River.	1823, June 13.
Opinion of A. G. Wirt on time when sale of land "is" authorized.	1825, Oct. 10.
Act to confirm certain New Madrid locations defective.	1827, Mar. 2, 4 St., 219.
Act reserving the Hot Springs and four sections including them from entry, &c.	1832, Apr. 20, 4 St., 505.
Act creating office of surveyor-general for Arkansas, and providing for transfer of papers pertaining to lands in Arkansas from Missouri.	1832, June 15.
Surveyor-general's office established at Little Rock and certain papers transferred.	1833.
First public survey made of Hot Springs lands and resurvey for Rector.	1838, Rec., 289.

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Supreme Court of the United States.

TERM OF 1875-'6.

No. .

THE HOT SPRINGS CASES.

GEORGE McKAY AND WILLIAM W. GITT

vs.

THE UNITED STATES, HENRY M. RECTOR, AND OTHERS.

BRIEF FOR HENRY M. RECTOR.

ALBERT PIKE,
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Supreme Court of the United States.

McKAY AND GITT *vs.* THE UNITED STATES.

BRIEF FOR RECTOR.

The Pleadings and Proofs.

The only merit of this case is its impudence; and the proofs of its being an audacious attempt to perpetrate a fraud are furnished by itself. There are deliberate falsehoods in the pleadings of the claimants; and their own papers (for all in the case are produced by themselves), prove their pleadings false.

1.

The Court of Claims disposed of it in these words:

"The claimants have set up in their petition, and offered in evidence on the trial, a deed from Langlois to Joseph Michel, executor, in 1805, conveying to Michel 200 arpents of land on the river Gayoso; but the Court finds that this was a distinct tract from the 200 arpents owned by Langlois on the bayou Saint John, and excludes the deed from its consideration. The claimants also offered in evidence on the trial an agreement, dated April 8, 1805, between Langlois and Michel, whereby Langlois acknowledges the payment from Michel for his "*improvements rights on bayou Saint John, containing the quantity of* 200 *arpents*," and binds himself to execute any further conveyance of the said pre-emption survey when called upon or requested so to do. Michel, never-

theless, is to pay all the expenses and trouble in obtaining any confirmation before the Board of Commissioners of Land Claims concerning the title to said plantation. But this agreement not having been set up in the claimants' petition, the Court likewise excludes it from its consideration. The claimants also read in evidence the will of Joseph Michel, and the various agreements or conveyances set up in their petition ; but having failed to show any interest in Michel, the Court likewise excludes all of such agreements or conveyances from its consideration."

2.

On the 20th of September, 1800, at New Madrid, François Langlois, creole of the Illinois and habitant of the Post of New Madrid, applied to the Intendente General for a concession of two hundred arpents, three leagues from the Post, on the Bayou St. John, between lands of Jean Baptiste Langlois and Dominio Real. On the 24th he obtained the recommendation of the Commandant ot the Post, virtually a concession. On the 17th of January, 1811, it was confirmed by the Board of Commissioners of Land Claims, and on the 20th of June, 1811, the Board ordered survey.

Record, 449, 495, 6.

3.

The Petition states that on the 27th of July, 1805, François Langlois sold all his lands in the New Madrid district to Joseph Michel, and conveyed the same to him by deed, leaving to himself only two lots of one arpent each.

A deed of that date is produced by the claimants, from Langlois and his wife to Michel, (Record, 446,) *not* for "all his lands in the New Madrid district," nor with reservation of two lots ; but for six specified tracts or concessions, (of which the land on Bayou St. John is *not* one,) to wit, the concessions of Fr. Lesieur, 250 arpents ; that of Jean B.

Hebert, 200 arpents (on the River Gayoso); part of that of John Hudgens, 300 arpents (on the Grand Marais); that of Peter Porier, 120 arpents; that of Anthony Porier, on the River Gayoso, 200 arpents; and that of Alexander Frazer, 200 arpents.

4.

The petition then alleges that Michel died in 1810, his will being dated April 9, 1810, leaving three sons, all minors, and making his brother-in-law, Robert McKay, executor.

5.

McCay, as Executor, it is then alleged, on the 26th of November, 1818, proved the injury done "to the said New Madrid lands by the earthquakes." This is not true. The injury was proved by the oath of George Tennille, on the 4th of August, 1818.

Record, 494.

6.

Next it is alleged that on the 9th of April, 1818, McCay "relinquished to the United States the lands at New Madrid thus injured, which had belonged to said Langlois, and which were sold and conveyed by said Langlois to said Michel in 1805."

That is false. Joseph Story relinquished the 200 arpents on Bayou St. John, by virtue of a power of attorney from François Langlois, with a town-lot in New Madrid, confirmed to the same, with other lands, to the United States, on the 27th of November, 1818, by deed signed, sealed and delivered in presence of two attesting witnesses, and acknowledged on the next day.

Record, 306.

The power of attorney from Langlois specially authorizing this was made on the 10th of November, 1818, to Story.

Record, 277.

And upon the registry on file in the office of the Recorder of Land Titles, it is entered that the relinquishment in the case of Certificate 467, François Langlois, 200 arpents, Lake St. John, was made by Joseph Story, agent.

Record, 313.

7.

There is among the papers in this case a paper or copy of a paper, (Record, 461,) purporting to be a deed, by which McCay, as Executor, relinquished divers tracts of land, and lots, to the United States. Among these is the tract of 200 arpents on Bayou St. John. Its date is 5th August, 1818, and it was acknowledged before the Clerk of the Circuit Court of the County of St. Louis, *but it never was filed with the Recorder of Land Titles or delivered to him, or to any other officer of the United States;* for on it is this indorsement: "Received for record, recorded and examined the foregoing, *on the first day of February*, A. D. 1847, *at the request of Wm. Gitt, Esq.*, TO WHOM I DELIVERED THE ORIGINAL."

Record, 463.

Thus the deed never was filed in the Recorder's office. If it had been, it would have remained there. Gitt would not have had it. How it came to him, he does not explain. It must have been retained by McCay, remained in his possession, and from it went to some one of the heirs, and thence to Gitt.

Therefore, the use to which it is put is fraudulent.

8.

On a copy of the application to locate by Hammond and Rector, there is a memorandum pencilled, (Record 495), to the effect that "The relinquishment for this certificate was made by Executor of Michel, August 5, 1818." It was admitted that this was no part of the copy of the record. When and by whom it was pencilled, is not known. It was intended, ap-

parently, to assist in producing the belief that the paper which Gitt had recorded in 1847, was a real relinquishment, accepted as such by the Recorder of Land Titles. The Court excluded the pencilling.

The counsel of McKay and Gitt, in the Court below, positively state in their brief that McCay, Executor of Michel, executed to the United States a deed of relinquishment; and, again, "We show a relinquishment, before Story's, by McCay, Executor of Michel, in whom was vested the undisputed title. This conveys the title to the injured lands to the United States, and not Story's deed. It was our land, and we gave it up, and therefore the equity is all with us." The learned counsel did not see that the paper claimed to be a relinquishment had never been delivered, nor know, though he himself produced it, that it was not in the Recorder's office, but in Gitt's hands, in 1847.

9.

The petition proceeds to allege, that, on this relinquishment, "*which was approved by the Recorder,*" McCay "*applied for the legal certificate*" authorizing the survey of the location applied for, *and on this application,* certificate 467 was awarded.

What benefit McKay, who swore to the Petition, supposed could be gained by the gross statement of palpable falsehoods, we cannot conceive. It is false that the Recorder approved the relinquishment. He never saw it, or, at least, he never received and had it. He received that from Story, attorney for Langlois, and registered it. The United States have no other, for the land in question, and never did have. It is false that McCay applied for the certificate, and it is false that it issued "on this application."

10.

Then it is alleged that he "made several applications for

the possession of the certificate, and was put off from time to time by the Recorder, with no reasonable excuse for non-issue." This is utterly false. No proof of it is even attempted.

Four certificates issued to Langlois. Two (Nos. 270 and 271), issued on the 24th of November, 1815. 270 was for injury to Lot 100, in Square No. 26, one arpent, in the village of Little Prairie. 271 was for Lot 101, Square 26, in the same village. Each authorized the location of 160 acres.

Record, 431, 430.

Certificate 270 was located on the 14th of March, 1821, by survey 2,596, on land in Township 44 North, Range 11 West, and 271, on the 21st of November, 1820, by survey 2,748, on land in 50 North, 16 West.

Exhibit or Schedule F: Record, 390–391.

Two other certificates were issued on the 26th of November, 1818; 470, for injury to a lot of one arpent in the village of New Madrid; 467, for the 200 arpents on Bayou St. John. Certificate 470 states that Langlois having received certificates 270, 271 and 467, there was still due to him or his legal representatives the residue of 640 acres, not to exceed 160 acres.

Record, 427, 277.

Richard Matson, as legal representative of Langlois, located certificate 470, on the North part of the N. E. quarter of Sec. 23, in Township 59 North, of Range 6 West, on the 8th of April, 1819.

Record, 428.

William Kincheloe located certificate 271, on the 21st of August, 1820, and he also assigned 270 to Horatio Chriesman, June 2, 1817, who assigned it to Thomas Rector, October 20, 1817, and located it, June 2, 1817, on land in 49 North, 17 West. But this interfered with a pre-emption,

and Thomas C. Rector located it, March 14, 1821, on land in 44 North, 11 West.

Record, 430, 1, 2.

Patent issued upon the location under certificate 470, on the 20th of April, 1848, *and was sent to W. W. Gitt.*

Schedule F, Record, 408.

No doubt the Recorder of Land Titles delivered Certificates 467 and 470 immediately upon making them out. At any rate Matson located 470 about five months afterwards; and Story assigned 467 a little more than a month after the day of its date.

Record, 428–276.

11.

Now, in all this, the name of McCay, executor of Michel, nowhere appears. There is not the slightest evidence in the case, that he had anything to do with proving the injury to the land and lots of Langlois, or with obtaining the certificates, or that he ever had any of the certificates. If he did get certificate 470, he could not help knowing that 467 was issued the same day, and delivered to Story; and there is no proof that he ever set up any claim to it; nor how Gitt became entitled to the patent on 470.

12.

McKay swears to the petition; and it states that the whole of the proceedings in regard to the location by Hammond and Rector, and what preceded it, "are evidently an attempted fraud on the claim of Michel and his representatives." And he ludicrously states that Michel owned a 200 arpent survey conveyed by Louis Tirart to Joseph Michel, and that Joseph Story relinquished this land, "Michel's 200 arpens of land bought from Tirart." "Can anything," he asks, "be more conclusive of Story's fraudulent character?"

There is an admirably cool impudence in this charge of fraud, in a petition signed "George Mackay, William W. Gitt." Gitt somehow found an old agreement, never recorded, between Michel and Langlois, in regard to his incomplete title to the 200 arpents on Bayou St. John, and engaged in buying up the rights of his heirs and others to it, knowing, as the peculiar wording of the conveyances that he took shows, that the certificate had been located by Hammond and Rector on the Hot Springs. It was not a very creditable business, and *his* purpose was to force Rector into some compromise. In other words, he bought up a worthless litigious title, with which to black-mail Rector. McKay, to whom he sold an interest, at a late day, was probably misled by him, and has intended no fraud. Gitt was not aware that a paper produced by himself would explode his whole case, and that Joseph Michel, though dead, would prove his evil genius.

13.

Joseph Michel, as his will shows, was a merchant, native of Genoa, who engaged largely in the purchase of such concessions. On the 8th of April, 1805, he and Langlois signed and sealed a memorandum of agreement, witnessing that Michel had paid Langlois, for his improvements on Bayou St. John, containing 200 arpents, the sum of $200, and that Langlois bound himself to make further conveyance when required, to give full title. Michel bound himself to pay all expenses and trouble in obtaining confirmation before the board of commissioners of land claims.

There is such an old deed in evidence. It is attested by two witnesses, and certified by "B. Olive, J. P," to have been acknowledged before him, by Michel and Langlois, on the day of its date. As an old deed, it proves itself, coming from the custody of Michel's executor or heirs. The law authorized its being filed with and recorded by the Recorder

of Land Titles; but it was never deposited with him, and of course was not recorded. A copy of it first appeared in the printed papers of the case, *interpolated in printing between two portions of a transcript from the office of the Recorder of Land Titles*, as if it were a copy from his records. That has been corrected by a note; but the paper is copied in the place whereinto it was put by direction to the printer, so as to appear to be a portion of the exemplification. The Court will find it in Record 445, between a deed from Antoine Poirier to François Langlois, (and its certificate of acknowledgment,) and an assignment of this deed (immediately after the interpolated paper,) by Langlois to Michel. The interpolated paper should not have been left where it is.

This agreement between Langlois and Michel was never filed or recorded anywhere; *and it is not mentioned in the petition.* Of the existence of the one that *is* alleged, there is no proof. But, treating the old deed that *was* produced, *as if it had been filed with the Recorder of Land Titles and recorded;* and as if a copy of the record of it formed an integral part of the exemplification, into the middle whereof it had been intruded, much stress was laid by the learned counsel upon the *fact*, so appearing, that by its filing and recording, Hammond and Rector had *notice* of its existence, and *therefore* took what rights they obtained, for the benefit of Michel or his executor. And yet the paper never had been filed anywhere, nor recorded anywhere. Michel kept it in his own custody. It, the original, was there among the papers of the case, showing for itself, wholly outside of the transcript, no part of it, and without a mark of any kind indicating that it had ever been recorded or filed anywhere.

We say that this old agreement is *signed* and sealed. There is a seal or scrawl after each name; but each made his mark.

Why was it necessary for Michel to sign and acknowledge it? And why the stipulation that Michel should pay all expenses and trouble in obtaining the confirmation? If it was

an absolute sale to him, his signing this was unnecessary, and this stipulation singular.

14.

On the 25th of March, 1810, Michel made his will. Record, 450.

By it he confirmed his marriage contract with Elizabeth Lafort, his wife, recognized his two bastards, Joseph Michel and Etienne, (baptised Etienne Clermont), and left to each a third part of his land, and to Napoleon, his third son, another third—each to have possession at the age of 21 ; subject to the rights of his widow, and to payment of his debts. He and his wife, the will states, were in community of property.

"Je declare," he says in it, "que je suis associé pour des terres, avec diverses personnes, suivant un acte déposé entre les mains de Mr. Laforge, et qu'il ne m'appartient que la moitié dans la vente qui m'a été faite par diverses personnes propriétaires, dont ledit Laforge a la note et la liste, et que Robert McCay, mon beau-frere connait bien lui-même."

That is, "I declare that I am partner in certain lands with various persons, according to an instrument deposited in the hands of Mons. Laforge ; and that only half belongs to me in the sale that has been made to me by various persons proprietors, whereof the said Laforge has the memorandum and list, and which Robert McCay, my brother-in-law, well knows."

"And after that the present, wherein one word is erased as null, has been read and re-read to me, in presence of the witnesses undersigned, I have set hereto my cross and my seal, as containing the intentions (*volontés*) which I dèsire should be executed, if God takes me from this world ; and for the execution whereof my Executors shall not be bound to give security.

Pierre A. Laforge and Robert McCay were appointed executors, and $2,000 charged on the lands in favor of his niece, Désirée Michel.

This will was proven on the 4th and 9th of April, 1810. Record, 451, 2.

15.

From the provision in the agreement of April 8, 1805, that Michel was to be at all the trouble and pay all expenses of obtaining a confirmation of Langlois' concession, (which would not have been written in an absolute conveyance,) coupled with the precise acknowledgment in the will that Michel owned only one-half interest in *all* the lands conveyed to him by the proprietors, the nature of the transaction is perfectly clear. Michel, perhaps paying something in money or goods, contracted with the *concessionaires* to procure confirmation of their claims for the joint and equal interest of each of them and himself.

Really having but a half-interest in the lands, he honestly said so in his will, that he might not wrong those who, trusting to his honesty and good faith, had conveyed their claims to him. A people honest and simple-minded, heedless and with little providence for the future, these Creoles had not required any other security for his good faith, than such as their agreements, signed also by him, contained.

And he said that his Executor Laforge had an *acte*, an instrument, executed by himself, showing all the claims in which he had a half-interest, and that his co-Executor McCay, also, knew all about it. Why is that not here, if it does not include Langlois' claim on the Bayou St. John?

Moreover, that claim, and probably most of them, had not been confirmed when he died. He had not yet become entitled, then, to half of each concession. But the *concessionaires* no doubt abided by their bargains with him. They were not a dishonest people.

It is a fine attempt at fraud, after more than fifty years, to set up a dishonest claim to the benefit of the location made by Story's vendees under certificate 467.

16.

On the 10th of May, 1832, it seems, in a suit in St. Louis circuit court in chancery between Matthew Boglio, heir and administrator of Etienne Boglio, (or Bogliolo,) and Robert McCay, executor, the commissioner's report, which had awarded certain property, real and personal, and an amount in money, to the plaintiff, was set aside by *consent;* and by consent, four slaves were awarded to him, and divers lots of land in New Madrid, and tracts of land, one of which is the two hundred arpents on Bayou St. John, confirmed to François Langlois, Senior.

Record, 453, 4 ff.

Many of the tracts so decreed were located by virtue of New Madrid certificates, but no mention is made of the Hot Springs location, or of certificate No. 467. All lots or tracts of land in the Territory of Arkansas, (without specification of particulars,) which were Michel's in his lifetime, belonged to his heirs, devisees, or legal representatives after his death, and had not been sold or conveyed by McCay, were decreed to belong to Bogliolo, and conveyance by McCay was decreed, *with special warranty only*, and so far only as Michel had title, or those under whom he claimed.

It seems that the heirs of Michel were parties, but they are not named, nor do the grounds of the decree appear, except that it was by consent.

On the 3d of May, 1834, Robert McCay made conveyance to Bogliolo, in pursuance of the decree, which he recited, of all the lands mentioned in it, warranting against claims of all the defendants in the suit, so far only as their claims were derived by inheritance from Joseph Michel; and it was also expressed that as McCay could not say whether some of the

lands had not been sold by him, any that had been so sold were not to be considered included.

Record, 464 ff.

How could McCay consent that the decree should include, and how could he, in 1832, convey, the Bayou St. John tract if, on the 5th of August, 1818, he had formally relinquished and conveyed it to the United States? As he had forgotten what lands he had sold, evidently he had forgotten that this tract belonged to the United States.

If it had passed to Bogliolo by the decree and deed, or if conveying it conveyed by way of legal consequence the located land that had been given by the United States in lieu of it, what right to either remained in Michel's heirs?

Why is it that in the various conveyances and powers paraded by these persons, certificate No. 467 does not appear among those enumerated, and the Hot Springs location is only covered by the general expression "all other lands?"

If the decree and conveyance in favor of and to Bogliolo were of any force, what was left to convey in any other person claiming under Joseph Michel?

What became of Laforge, the other executor?

17.

The agreement between Langlois and Michel, and the deed found among Michel's papers after his death were never recorded. Langlois continued in possession of the land on Bayou St. John, and, to the full knowledge of McCay, the executor, proved that he lived on it and cultivated it when it was injured by earthquake, and obtained the New Madrid certificates in his own name, and not only gave Story a power of attorney and conveyance, but assigned to him and put into his hands the certificate No. 467. There being no notice of the agreement with and deed to Michel by recording, and the executor not claiming the certificate or pro-

ducing the agreement or conveyances to the Recorder of Land Titles, the *bonâ fide* purchasers from Story, (Hammond and Rector,) would have had a right far superior to that of Michel's estate, even if he had *bonâ fide* and absolutely bought the land on Bayou St. John.

AS TO THE LAW OR EQUITY OF THE CASE.

There is little law and no equity in it.

1.

There is not the faintest tinge of *equity* in the case, even as it is stated in the petition. If the executor had a right to certificate 467, the courts were open to its assertion. Permitting it to be received by Story, and taking no step to prevent its location by Hammond and Rector, he had not the slightest claim to the land located with it by them; and the claim of Gitt, preferred after more than fifty years, is as ridiculous a one as ever folly hatched, even if all the falsehoods in the petition were truths.

2.

But no more need be said in regard to this preposterous claim than that it has no more bottom than a piece of sewer-pipe. If any interest in the Bayou St. John land remained in Michel, by virtue of the agreement of 27th July, 1805, and the deed kept among Michel's papers, Michel's will was his solemn admission that he owned no more than one-half of *any* land conveyed to him by the *propriétaires*. He died between the 25th of March and the 4th of April, 1810, and Langlois' claim was not confirmed until January 17, 1811. It was confirmed to Langlois himself, and as Michel had bound himself to be at the trouble and expense of obtaining a confirmation, the only claim his estate had against Lang-

lois was for the $200 which he paid Langlois for a half interest in his claim.

3.

Langlois, no doubt, abided honestly by his bargain. If McCay did not get one of the two certificates 270 and 271, he never asserted any claim to one. He did get the patent for the land located with certificate 470. Story got but 467; and McCay, no doubt, got 470, issued the same day. It is not alleged that he did not, or that he made any complaint.

This fact of itself estops all these people. It was too late, after half a century, to set up a claim to certificate 467. In fact, Gitt alone has done it all. It is named in the power given him by Joseph Michel, in the deed of Bogliolo, in March, 1849; in the power of attorney of Rosalie Huston to Gitt, in February, 1847. The decree in favor of Bogliolo does not mention it, nor does the executor's conveyance to him, nor the powers of attorney of Stephen Michel, Rosalie Huston or Lafont. It was probably not safe to let those persons know that they were being made fraudulently to convey to Gitt an interest in the Hot Springs of Arkansas.

And if those had known it, in whose powers or conveyances the certificate was mentioned, the consideration would not have been, as it was, either nothing or nominal in either. Gitt has gone round to foment litigation, if he could not blackmail Rector; and it is not these heirs, or persons not heirs who have set up this preposterous and fraudulent claim, but Gitt himself.

4.

If McCay was entitled to certificate 467, he did not assert any right to it. It was assignable, and Hammond and Rector were bonâ fide assignees of it for valuable consideration, justified in purchasing it, by the power of attorney to Story. They had no notice of any right to it in Michel or his execu-

tor; and if McCay *was* entitled to it, he could not recover it from bonâ fide assignees for valuable consideration, without notice.

The will of Joseph Michel was a sacred law to his heirs The only law that they knew made it so. The law of the Twelve Tables said, "*Uti Paterfamilias legasset, ita jus esto!*" and the statement in his will that the original proprietors owned one-half of all the lands conveyed to him created a *fideicommissum*, and bound his heirs to convey, if it were necessary, that one-half to each.

Fideicommissa quocunque sermone relinqui possunt. (Ulpian: Dig. xxxii. L. 11.)

Nutu etiam relinquitur fideicommissum. (Paul: Dig. xxxii. L. 21.)

If the words expressed only advice, a wish, a request, there was created a fideicommissum. (Ulpian, Dig: xxxii. L. 11. § 9.)

Etiam hoc modo, *cupio des*, *opto des*, *credo te daturum*, fideicommissum est. (Ulpian, Dig: xxx. L. 115.)

Et eo modo relictum, *exigo*, *desidero*, *uti des*, fideicommissum valet: sed et ita, Volo hæreditatem meam Titii esse; scio hæreditatem meam restituturum te Titio. (*Neratius:* Dig. xxx. L. 118.)

And so sacred and obligatory were fideicommissa that Papinian held, and Justinian adopted it as law: Etiam Respublica fideicommisso post moram usuras præstare cogitur. (Dig. xxxi. L. 78, § 2.)

When Scævola was asked whether, when a testator acknowledged having promised by oath to pay a sum of money, this was sufficient to enable the party entitled to recover it as a deposit; this is what he said: Respondi, ex his quæ proponerentur, scilicet cùm jusjurandum dedisse super hoc testator adfirmavit, credenda est scriptura.—Dig. xxxii. L. 37, § 5.

Sententiam defuncti á liberis decipi satis inhumanum est; the same great lawyer said: and in a case where a testator

had said by his will: "I direct that there be returned by my heirs, to my wife Sempronia, a hundred aurei, which I borrowed of her"; and she sued for them as for money loaned, and was defeated, he held that she should recover them on the ground of trust: Respondit posse ex causâ fideicommissi peti, quòd apparuisset non fuisse ex aliâ causâ debitum.—Dig. xxxii. L. 93, § 1.

Whoever may be my heir, let him know that I owe my uncle Demetrius three denaria, and that my uncle Seleucus deposited three denaria with me, which I order forthwith to be returned and paid to them." It was asked whether if these moneys were really not owed, an action lay for them, and the great Scævola replied: "Si non deberentur, nullam quasi ex debito actionem esse, sed ex fideicommisso." (Dig. xxxi. L. 88. § 10.)

The will of Michel significantly said that his executors were fully informed as to the rights and interests of the *propriëtaires*, and that one of them had a list of the lands.

Why state this, unless to indicate unmistakeably his intention that his executors and heirs should secure to those who had trusted him, so much as he stated was their own, of the lands which he held as if sole owner? There never was a clearer *commissum, hæredum fidei.*

So that, if what Michel stated in his will *had not been true*, if he had only intended to give by donation to the *propriëtaires*, the half of the land that each had conveyed to him, his heirs, instituted by the will, would have held that half of each tract by way of *fideicommissum*. It was not optional with them to comply with the law of the will. The law of the land made it compulsory, for the civil law governed there.

If the charge, called also in law, *modus*, differs, in certain respects, from a condition, it takes the character and produces the effects of one, in this sense, that if the legatee does not execute it, *he loses his right to the legacy*, which, in this respect, is but a conditional one. In the Roman law, the

mode and the condition of testamentary dispositions are subjected to the same rules: In legatis et fideicommissis etiam modus adscriptus pro conditione observatur.—*Chardon: Traité du dol et de la fraude; Part* II, *Vol.* III, *No.* 611.

6.

But, in fact, the will did more than create fideicommissa. It made known to the heirs of Michel, in the most solemn and authentic manner, what was well known already, as he declared, to those who were to execute and carry into effect his will, the fact, that although he held conveyances of the various claims on lands, he held one half of each in trust for the *concessionaire*. When a man admits that a deed made to him, absolute on its face, is really but a mortgage, and declares this expressly by his will, his heirs cannot very well refuse to recognize it as a mortgage.

For more than one reason, this is a shameless suit, deserving to be dismissed with profound contempt.

ALBERT PIKE,
ROBERT W. JOHNSON,
JOHN B. SANBORN,
CHARLES KING,
Of Counsel for Rector.

Supreme Court of the United States

WILLIAM H. GAINES *et al*, *Plaintiffs.*

vs.

JOHN C. HALE *et al*, *Defendants.*

Error to the Supreme Court of Arkansas.

BRIEF FOR APPELLANTS.

The case has been in this Court before. See *Hale v. Gaines*, 22 *How.*, 145.

Judgment having been given in ejectment in favor of the heirs of Belding (who are the appellants here) against Hale, the latter filed his bill in chancery to enjoin the execution of the judgment. A pretty full history of the litigation is contained in the case in 22 *How.*, above referred to. Hale, in his bill in the present case, claimed under John Percifull, as pre-emptor, who was alleged to have settled on the land in 1808 or 1809; whose right was said to exist under the act of April 12, 1814. 3 *Stat. at Large*, 121. The bill sets out the claim of Percifull

under this act; asserts that Ludovicus Belding, the ancestor of the appellants, only occupied the lands as the tenant of Percifull; refers to the asserted title of Henry M. Rector, under a New Madrid location of Francis Langlois, of date November 26, 1818, and gives a history of an extended litigation between all the parties before the land officers, which resulted in the issuance of a certificate to the appellants, upon which they recovered in the ejectment suits. Injunction was granted as prayed for. (*Tr.* 29.)

The appellants answered, denying the the settlement and occupation of Percifull, and asserted that he conveyed any and all interest he might have claimed on the 4th of October, 1824, to Joseph Paxton, from whom the claim has never passed (145); state that Ludovicus Belding settled on the land in 1828, in the month of February, with the permission of Percifull, and that he made improvements on the land; that himself, his tenants, and after his death in October, 1833, his widow and his children, the appellants, have remained in possession of the part of the tract occupied by him. A history is here given also of the litigation before the land officers, and the equities of the bill are denied. (*Tr.* 144.) Afterwards Hale filed his supplemental bill, alleging that the entry of the appellant had been cancelled by the Secretary of the Interior. (*p.* 201.) Rector having filed his bill in the same court, setting up his claim under the New Madrid act of February 17, 1815, the two cases were consolidated and heard together (228).

See Rector's bill (247) and answer of appellants (322). See also Rector's supplemental bill, (607) wherein he sets up that the property had been seized as his under the confiscation acts, and restored to him on pleading the pardon of the President, which he conceived made his title good.

There was a vast mass of testimony; much of it quite out of the question; and on a final hearing the Court decreed in favor of Hale's claim, and perpetuated the injunction granted to him. On appeal to the Supreme Court, it was held, by a divided court, that the title was in the United States, and all the parties were

enjoined from interfering with each other's improvements, (671).

We assign for error that this decree was wrong, and that the bills of Hale and Rector should have been dismissed for want of equity.

HALE'S CLAIM.

He asserts title to the quarter section of land on which the Hot Springs are situated, by virtue of the claim to a pre-emption made by John Percifull under the act of congress of April 12, 1814, entitled "An act for the final adjustment of land titles in the State of Louisiana and Territory of Missouri," and which may be found in the 3d volume of the *United States Statutes at Large, p.* 121. Under the fifth section of that act it is supposed by the bill that John Percifull acquired his pre-emption, which is now claimed by purchase from him by Hale. The fifth section is as follows:

"*And be it further enacted,* That every person, and the legal representatives of every person, who has actually *inhabited and cultivated* a tract of land lying in that part of the State of Louisiana which composed the late Territory of Orleans, or in the Territory of Missouri, *which tract is not rightfully claimed by any other person,* and who shall not have removed from said State or Territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same restrictions, conditions, provisions and regulations, in every respect, as is directed by an act entitled 'An act giving the right of pre-emption in the purchase of certain lands, to certain settlers in the Illinois Territory;' passed February 5th, one thousand eight hundred and thirteen."

The act thus referred to may be found in the 2d volume of the *United States Statutes at Large, p.* 797. For the convenience of the court we transcribe it word for word:

"*Be it enacted, etc.,* That every person, or legal representative of every person, who has actually inhabited and cultivated a tract of land lying in either of the districts established for the sale of public lands in the Illinois Territory, which *tract*

is not rightfully claimed by some other person, and who shall not have removed from said Territory; every such person and his legal representatives, shall be entitled to a preference in becoming the purchaser, from the United States, of such tract of land at private sale, at the same price and on the same terms and conditions, in every respect, as are, or may be, provided by law for the sale of other lands sold at private sale in said Territory, at the time of making such purchase; provided, that no more than one quarter section of land shall be sold to any one individual in virtue of this act; and the same shall be bounded by the sectional and divisional lines run, or to be run, under the direction of the surveyor-general for the division of the public lands; provided, also, that no lands reserved from sale by former acts, or lands which have been directed to be sold in town lots and out lots, shall be sold under this act.

"SEC. 2. That every person claiming a preference in becoming a purchaser of a tract of land in virtue of this act, shall make known his claim by delivering a notice in writing to the register of the land office for the district in which the land may lie, wherein he shall particularly designate the quarter section he claims, which notice the register shall file in his office on receiving the sum of twenty-five cents from the person delivering the same; and in every case when it shall appear to the satisfaction of the register and receiver of public moneys of the land office that any person, who has delivered his notice of claim, is entitled, according to the provisions of this act, to a preference in becoming the purchaser of a quarter section of land, such person, so entitled shall have a right to enter the same with the register of the land office, on producing his receipt from the receiver of public moneys, for at least one-twentieth part of the purchase money, as in case of other public lands sold at private sale; provided, that all lands to be sold under this act shall be entered with the register at least two weeks before the time of the commencement of the public sales in the district wherein the land lies, and every person having a right of preference in becoming the

purchaser of a tract of land, who shall fail so to make his entry with the register within the time prescribed, his right shall be forfeited, and the land by him claimed shall be offered at public sale with the other public lands in the district to which it belongs."

We think it clear enough that John Percifull was not entitled to a pre-emption under the provisions of these acts.

1. He had not "actually inhabited and cultivated" the land on the 12th of April, 1814.

If the parties would establish this pre-emption the burden of the proof is on them, and they must show their right with a reasonable degree of certainty; and vague presumptions are not to be indulged in to uphold a private right against the government. Under the act of the 12th of April, 1814, neither cultivation nor inhabitancy alone could confer a claim; but both must concur. We understand the word "inhabit" here to have its ordinary meaning, and as being equivalent to the term "live upon." The obvious design of these expressions was to guard against two kinds of claims, neither of which was regarded by the government as meritorious; first, those claims growing out of a system of absenteeism, where one might design to fix the title to land by cultivation by proxy, intended to subserve no other purpose than to secure the pre-emption, after which the cultivation might be abandoned and the land for a long time be no further reclaimed; and, second, that class of persons who might squat on mineral land and by mineral springs, without any view to agricultural pursuits. Both of these classes of men were well known in connection with the public lands, and had failed in recommending themselves to the law-making power; and were purposely excluded by the terms of this act.

It will be seen that the witnesses to support the Percifull claim are frequently embarrassed by the requisite included in the phrase "actually inhabited," and that they gladly find relief in expressions of by no means synonymous import. So the witness Silas Dodd, (*Tr. p.* 42,) says that Percifull was "in possession" of the land in June, 1812, before the act had passed,

and (*p.* 43) that he understood and "verily believes that the place and improvements *belonged* [*to*] *or were claimed by*" Percifull. James Neale, (*p.* 50,) testifies to the possession of Percifull in the *summer* of 1812, when Holman also lived there, and that there was a small piece of ground in cultivation there, though he never saw Percifull cultivate it; and testifies substantially to the same state of facts in 1814. Thomas Woodward, (*p.* 52,) testifies that Percifull was in possession in 1816! William Davis, (*p.* 54,) knew nothing of the Springs until 1819. Basset, (*p.* 75,) says Percifull resided there in 1828. Hegnight, (*p.* 85,) does not say where Percifull resided. Hawkins says, (*p.* 163,) that Holman told him that the facts were different from the statements which were afterward made in his deposition; and he said that a Frenchman made the first improvements at the Springs in 1811 or 1812, and that Percifull lived at the Gulpha, on the Ouachita river, from 1811 to 1813, and that Percifull never did reside at the Springs and cultivate land there until 1816. Barkman, (*p.* 164,) says that Mrs. Percifull did not go to the Springs until the fall of 1813 or 1814, and that John Percifull never lived at the Springs until 1819. Even then he does not seem to have cultivated the land. About 1816 he removed to Red River and remained there two years. In 1833 Percifull told Rapley his history; how he came to the territory merely to hunt, and (*p.* 165) that he moved about from one place to another, living in a camp until, in 1813 or 1814, he settled his place on the Ouachita river, where he had ever since lived and cultivated the land, some six or eight miles from the Springs. Jacob Barkman, (*p.* 166,) says he came to the country on the 7th of January, 1812, when the lands about the Springs were in the possession of various persons coming for the use of the waters, among others of the Indians; and he says that there was some cultivation in 1812, which was by a man named Fitzgibbons, (*p.* 167,) and in that year Percifull was living at the mouth of the Gulpha, and he continued to live there on his farm in 1813 and 1814; and that in those years Percifull sometimes went to

the Springs to sell venison to the visitors; and (*p.* 168) that he had no cultivation there during those years; and that he did not live there until 1819; and that the houses there had been left in his charge by a man named Prudhomme, doubtless the Frenchman above referred to. He says, positively, that Percifull did not live at the Springs or cultivate land there in the years 1812, 1813, or 1814. No pre-emption law had as yet been passed, the Indian title had not been extinguished, the land had never been surveyed; neither Percifull nor any one else had sufficient foresight to perceive that actual settlement and cultivation of the land might some day confer a title to the Springs; the place was not suitable for agricultural enterprise; various persons erected cabins there, and stayed during the summer months, and abandoned the place during the winter; Percifull had found better land some miles off, where he cultivated a few acres, and devoted his time to hunting, the proceeds of which he sometimes sold at the Springs. Such is the picture of the locality from 1812 to 1815, as drawn by this witness, in strict accordance with the ordinary conduct of men; Percifull not dreaming of any favors from the government, and the visitors at the Springs, with their improvised cabins, not seeing any farther into the future legislation of congress than himself.

Abner Hegnight (*p.* 70), lived with Percifull two years, beginning some time in 1810 or 1811—thinks it was 1811—and during this time Percifull lived on his place on the Ouachita river, and he found him living there in 1815. This witness, and others, were hired by Percifull to labor on his Ouachita place, partly in clearing land; and Percifull did not cultivate any land at the Springs during this time. He also speaks of Prudhomme's residence at the Springs, and of Percifull's removal to Red river; and he says the people looked on Percifull as being a kind of proprietor of the Springs, because he furnished provisions to the visitors; and this was, at that time, the extent of his claim. Bernard Bonne (*p.* 173), says that in October, 1813, there was no one living at the Springs, and there was nothing there but some camps made of poles, and

there was no cultivation; and Percifull was living on the banks of the Ouachita. In 1814 there were forty or fifty Indians there, and some of them had houses, and Percifull was still on the Ouachita. Richard C. Hawkins (*p.* 175) pays that Percifull told him that in 1808 he went to his place on the Ouachita to live.

Such is the evidence taken before the land officers. The testimony taken in this present proceeding is far from countervailing the weight of that before submitted. James Neale (*p.* 232) repeats his former deposition with great amplitude. His evidence is not in accordance with the statements of any other witness, nor with those of Percifull himself. Lovejoy (*p.* 234) knew nothing of the Springs until 1826. Grant was never there till 1828 (*p.* 235). Physick (*p.* 236) not until 1830; Woodward not until 1814 (*p.* 245). With the exception of Stroud's testimony, no new light is thrown on the question of Percifull's settlement and cultivation prior to April 12, 1814; and the weight of the whole evidence is manifestly against the claim.

We respectfully submit that this evidence fails to show, with any reasonable degree of certainty, inhabitancy and cultivation of the land prior to the passage of the act of April 12, 1814; but the converse is clearly shown; and the register was evidently right in saying, (*id.*, *p.* 182,) after having assisted in taking the evidence, "I am clearly of the opinion that the said heirs and legal representatives of John Percifull, deceased, having failed to establish actual inhabitancy and cultivation, as required by the act of the 12th of April, 1814, under which they claim, are not entitled to the benefit of pre-emption."

It is in vain to prove that after the passage of the pre-emption act of 1814, Percifull went on the land and began to cultivate it. The commissioner of the general land office expresses the obvious meaning of that act, in speaking of the custom of his department, when he says: "I find that in the administration of these laws this office has uniformly held that the words '*every person who has* actually inhabited and cultivated a tract

of land,' restrict the right to cases of settlement continuing *at the date of the acts*; that the acts are not prospective so as to secure the pre-emption privilege to persons making settlement and cultivation after their passage."

The act is not prospective simply because it does not purport to be so; and the language is too plain to admit of construction. To give it any other meaning would be to make a new law. But if we were to resort to construction we should find that all such statutes must be strictly construed, and the courts can not by finesse of interpretation enlarge the grants of the government.

In all cases of grants, the interpretation should be most favorable to the public, and most strongly against the grantee. *Townsend vs. Brown*, 4 *Zabr.*, 80. Nothing passes by implication in a grant from the state, except what necessarily flows from its nature. *Mayor, etc., vs. Ohio & Penn. R. R. Co.*, 26 *Penn. S. R.*, 355. A gratuitous grant by the state must be restricted to its obvious and plain intent, and must be construed most favorably for the government. *Greene's estate*, 4 *Md. Chy. Decis.*, 349; *McLeod vs. Burroughs*, 9 *Geo.*, 213; *Harrison vs. Young*, *id.*, 359; *Hayan vs. Campbell*, 8 *Port.*, 9; *Academy of Fine Arts vs. Philadelphia county*, 22 *Penn. S. R.*, 496. The grants of the government are to be construed strictly, and not most strongly against the government. *McManus vs. Carmichael*, 3 *Clarke*, (*Iowa*,) 1. If the meaning of the words be doubtful, they shall be taken most strongly against the grantee. *Minturn vs. Larue*, 1 *McAll. C. C.*, 370.

If the evidence fails to show then, in a manner satisfactory to the court, the settlement and cultivation of the land prior to April 12, 1814, by John Percifull, here is an end of the whole case.

2. But if we were to admit that John Percifull lived on and cultivated the lands prior to that time, instead of on his place on the Gulpha, some miles off, it will be seen that he voluntarily sacrificed the rights which he might be supposed to claim from these facts. His abandonment of the country about

the Hot Springs, his change of residence to Red river, where he lived for two years, are undisputed facts. What became of his pre-emption during that time? Were the other persons living or staying temporarily on the land during that time merly his stewards pending his absence, whether that absence might be long or short? It is not shown that they held for him any more than for any other person who lived there, or that during his residence on Red river his rights of sovereignty were recognized. The absence was long, the claim was frail and precarious, and the case came clearly within the purview of the decisions as to the voluntary abandonment of pre-emptions.

"Continuity of actual possession is the vital principle of a pre-emption right, and a part of its legal definition; and a voluntary removal from the land, by which a residence is fixed elsewhere, will be deemed an abandonment." *Jacobs vs. Figans*, 25 *Penn. S. R.*, 45. "Settlements must not have the smallest cast of abandonment." *Watson vs. Gilday*, 11 *Serg. & R.*, 340. "*Vigilantibus et non dormientibus jura subveniunt*, is a maxim applicable to all who seek to perfect an imperfect title, and to none more strictly than to those who assert inchoate titles to land under our system. Vigilance is the price of safety. To it indolence and carelessness are always postponed." *Farmers' Bank vs. Woods*, 11 *Penn. S. R.*, 113; *Goodman vs. Losey*, 3 *Watts & S.*, 526. "It seems to have been the intent of the law that possession of the improvement should be actual and continued; and hence it would follow that if there had been a voluntary abandonment of the improvement by the settler, he would forfeit all the pro-emption privileges, and a sale made after such improvement *would convey no right of preference to the purchaser.*" *Bledsoe vs. Cains*, 10 *Tex.*, 458; *Simpson vs. McLemore*, 8 *id.*, 448; *Clemmens vs. Gottshall*, 4 *Yates*, 330; *Byron vs Sarpy*, 18 *Mo.*, 460; *Page vs. Scheibel*, 11 *id.*, 167.

3. Whatever claim Percifull had after his abandonment, he sold to Dr. Joseph Paxton, and conveyed to him by deed of the 4th of October, 1824. See answer of Gaines (*p.* 190). By this deed Percifull conveyed "all his right, title, claim and

interest of, in and to the Warm Springs, lying near the Ouachita river, together with all his right of pre-emption and every advantage that said Paxton can obtain by any claim," and the deed was made in consideration of the payment of one thousand dollars, the receipt of which was acknowledged; and Percifull bound himself to warrant and defend the claim thus conveyed; and the deed was duly recorded on the 7th day of April, 1827, long before the inception of Hale's claim.

No re-conveyance of this claim to either Percifull or Hale is anywhere shown. Nothing but a re-conveyance could restore the title. In *Strawn vs. Norris*, 21 *Ark.*, 82, it was held that "the surrender or destruction of a deed, though not registered, will not operate to revest the grantor with title;" and many authorities are cited to sustain this position. That, also, was a case in chancery. Whatever claim then Percifull had is still outstanding in Paxton, unless this court is prepared to overrule these decisions. "The plaintiff in a suit putting in contestation the title to land, must show title to himself at the commencement of the suit, and if it appear that he had parted with his title before that time, he cannot recover." *Simpson vs. McLemore*, 8 *Tex.*, 448.

4. Before the land officers the claim of Percifull was signally unfortunate, a fact which Hale attributes in his bill to the fraud of these officers, but which may more justly be referred to want of merit in the claim. No evidence of corruption in them is presented, and the legal presumption of their innocence is doubly fortified, since it has been attacked in vain.

When the case was remanded to the register and receiver, Mr. Wilson, the commissioner of the general land office, directed that their opinion should be "based upon the sufficiency or insufficiency of the evidence as to the performance of the things prescribed by law, in reference to the *settlement*, cultivation and possession of the party, and to other acts required of said claimants, and irrespective of the merits of any other conflicting claim, or without reference to the question whether said land is or is not subject to the particular law upon which the particular claim is founded." (*p.* 57.)

The decision of Hempstead, the receiver, was favorable to the Percifull claim, and he stated that he found that Percifull actually inhabited and cultivated the land prior to the 12th of April, 1811 and 1812. As the act was not passed until April 12, 1814, he carefully omits anything with reference to the question of the continued residence of Percifull, and all other collateral questions. The only question upon which he passed was one of fact, the inhabitancy and cultivation of 1811–12. (*p.* 124.) The register, however, was "clearly of opinion" that the heirs and representatives of Percifull had failed to establish actual inhabitancy and cultivation, as required by the act of the 12th of April 1814, and that they were not entitled to a pre-emption. (*p.* 182.)

With regard to the claim of Belding, the receiver acknowledged the settlement and cultivation of Belding, but found that Belding was the tenant of Percifull, and that his rights should enure to the benefit of his landlord. Here is a question which we will discuss at a proper time; but is one which the receiver had no right to cling to, seeing that he had been plainly instructed to reserve questions of law, and merely to inquire of facts, it being supposed that the government had at its service competent legal officers, to whom questions of law should more properly be referred. The register simply found the fact of the settlement of Belding to have come within the requirements of the pre-emption law of 1830. The conclusions of fact, to which their attention was solely directed, were by both officers the same as to the Belding claim; only the receiver permitted himself to indulge in legal speculations.

When the land officers at Washington directed that Belding's heirs should be permitted to pay for the land and enter it, they instructed the receiver to note that the entry interfered with the Langlois claim and the reservation of 1832; but not with any claim of Percifull. Here, after years of examination by the most competent persons, versed in the law and practice as to these claims, the Percifull claim was finally ignored, and the investigation as to it was closed.

What is the effect of this adjudication? Is it *prima facie* correct, or is it conclusive, or is it simply of no weight whatever, not even advisory or persuasive?

The general principle of law is, that where any matter is adjudicated by a tribunal of peculiar and exclusive jurisdiction, and where no appeal is allowed, such adjudication is final and conclusive upon all other courts, unless impeached upon the ground of fraud. *Wilcox vs. Jackson*, 13 *Pet.*, 511; *Vorhees vs. U. S. Bank*, 10 *Pet.*, 478; *U. S. vs. Arredondo*, 6 *id.*, 729; *Foley vs. Harrison*, 15 *How.*, 448; *Borden vs. State*, 11 *Ark.*, 547.

This principle has been in many cases applied to the decisions of land officers upon questions arising out of conflicting claims to pre-emptions. *Wilcox vs. Jackson*, 13 *Pet.*, 511; *Nick's heirs vs. Rector*, 4 *Ark.*, 284; 2 *Laws, Instructians and Opinions*, (*ed.* 1838,) *p.* 85, *No.* 57; *Gaines vs. Hale*, 16 *Ark.*, 25; *Mitchell vs. Cobb*, 13 *Ala.*, 139; *McGhee vs. Wright*, 16 *Ill.*, 557; *Lewis vs. Lewis*, 9 *Missouri*, 186; *Perry vs. O'Hanlon*, 11 *id.*, 591; *Haydell vs. Dufresne*, 17 *How.*, 30; *Lamont vs. Stimpson*, 3 *Wis.*, 545; *Lovinggood vs. Burgess, Busbee, Law*, (*N. C.*,) 449; *Abbott vs. Bahr*, 3 *Chand., Wis.*, 210; *Gray vs. McCance*, 14 *Ill.*, 343.

In the case of *Lytle vs. State of Arkansas*, 22 *How.*, 203, the court say, "Another preliminary question is presented on the record, namely, whether the adjudication of the register and receiver which authorized Cloyes' heirs to enter the land, is subject to revision in the courts of justice, on proof showing that the entry was obtained *by fraud and the imposition of false testimony on those officers* as to settlement and cultivation. We deem this question too well settled in the affirmative for discussion."

The case of *Barnard vs. Ashley*, 18 *How.*, 44, merely decides that the commissioner of the general land office has the power to revise the acts of the register and receiver, under the provisions of an act of congress of July 4, 1836.

In the case of *Garland vs. Wynn*, 20 *How.*, *p.* 8, the court say: "The question is, have the courts of justice power to ex-

amine a contested claim to a right of entry under the pre-emption laws, and to over-rule the decision of the register and receiver, confirmed by the commissioner, *in a case where they have been imposed upon by ex parte affidavits*, and the patent has been obtained by one having no interest secured to him in virtue of the pre-emption laws, to the destruction of another's right, who had a preference of entry, which he preferred and exerted in due form, but which right was defeated by *false swearing* and *fraudulent contrivance*, brought about by him to whom the patent was awarded?

"The general rule is, that where several parties set up conflicting claims to property with which a special tribunal may deal as *between one party and the government, regardless of the rights of others*, the latter may come into the ordinary courts of justice and litigate the conflicting claims."

It will be seen that these cases apply only where the proceedings before the land officers have been (first) on *ex parte* affidavits, and (second) where the land officers have been imposed on by *false swearing*.

The decision here was not made on affidavits, but on depositions, in which the witnesses were duly and strictly cross-examined. The evidence has not been impeached. No fraud has been made manifest.

Under these circumstances the judgment of the land officers is entitled to the highest respect. Their opportunities for forming a correct conclusion were not inferior to those which the courts possess; they were acting within the familiar domain of their own jurisdiction; their capacity and competency can not be impugned. More than this, they were right.

5. There is a remaining objection to the claim of Percifull which seems almost by common consent to be fatal. The act of April 12, 1814, did not apply to these lands, because they were not then subject to the disposing power of the government. The lands were in the possession of the Quapaw Indians, and their title was not extinguished until their treaty

with the United States of August 24, 1818, approved by the President on the 5th of January, 1819; by which treaty these lands were formally ceded to the government. Prior to that time the lands were not claimed by the government, and the Indians were under its protection. No inducement was held out to settlers to molest them by the irruption of white men, and the settlement of the country which they inhabited, and which they claimed by a title which the government was bound to respect.

The act itself contained the careful provision that the preemption must be on land "not rightfully claimed by any other person." It is difficult to see what right could be better established than that of the Indians to the lands which they had immemorially occupied; a right founded on prescriptive possession at a time when no European knew the continent which they inhabited.

The practice of the government in matters of this kind is familiar. The ability of the government to purchase has always been ample, and the Indians have consented to evade the precincts of advancing civilization by timely concession and retreat. In the last analysis the dominion over the Indian tribes necessarily resides with the government; but it is not a supremacy to be cruelly exercised; and is by no means inconsistent with humane feelings and honorable protection.

The policy of the government has been to protect the Indians no less from their own improvidence than from the oppression so easily exercised over them. So *individuals* have not been allowed to acquire titles to land from them even by purchase. Every such acquisition has been by purchase by the government from the tribe in the occupancy of the soil; a voluntary sale for a fair and just consideration, evidenced by solemn and public treaties, of which the country has no reason to be ashamed. So this court, speaking of the rights of the Indians, to the land which they occupied, says: "No previous grant of congress could be paramount, according to the rights

of occupancy which this government has always conceded to the Indian tribes within her jurisdiction." *Gaines vs. Nicholson*, 9 *How.*, 365.

In the case of the *Cherokee Nation vs. State of Georgia*, 5 *Pet.*, 17, Chief Justice Marshall said that the "Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until the right shall be extinguished by a voluntary cession to our govrnment. * * Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and power; appeal to it for relief to their wants; and address the President as their 'great father.'"

In the case of the *People vs. Dibble*, 16 *N. Y.* (2 *Smith*), 212, the court say of the Indians: "They have been treated since our first intercourse with them as *quasi* independent nations or tribes, having governments and institutions and national attributes of their own: but both collectively and individually feeble and helpless, compared with the whites, and therefore needing constantly the protection and paternal care of the government. Their rights of property in the lands rise no higher than the right of occupancy, which it has been the constant care of the government never to disturb, *unless with their consent*, and then under regulations of justice and humanity;" and in that case it has expressly decided that a citizen who entered upon Indian lands, before their title had been extinguished, acquired no rights which the law would acknowledge. To the same effect see *Dole vs. Irish*, 2 *Barb. Sup. Ct. R.*, 641; *Fellows vs. Lee*, 5 *Denio*, 628.

The decisions of the officers of the government on this point have been uniformly consistent. Mr. Wirt, attorney general, on this subject, said: "These lands were not at the date of the act authorized to be sold, the title being at the time in the Quapaw Indians. To extend the pre-emption to lands subsequently ceded by the Quapaws, would be to construe the word 'and' to mean 'shall have been.' * * * But the act as it stands

speaks in the present tense, and it would, I think, be rather too bold a construction to convert the present tense into the future past." *Public Lands, Laws, Instructions and opinions, Pt. II., p.* 29, *No.* 25.

Mr. Butler, attorney-general, said that the pre-emption act of 1814 did not include the lands described in the Quapaw treaty of 1818, and that that treaty was a solemn recognition of the Indian title which neither the United States nor any one claiming thereunder could dispute. *Id., p.* 92, *No.* 59. See also *id. No.* 54, *p.* 81; *No.* 10, *p.* 10; *No.* 11, *p.* 11; *No.* 12, *p.* 13; *No.* 23, *p.* 25; *No.* 787, *p.* 816.

A similar decision was made by Mr. Hendricks, commissioner of the general land office, in this case. See *Tr., Pt. II., p.* 147.

In *Strong vs. Waterman*, 11 *Paige*, 607, Chancellor Walworth held the Indian right of occupancy to be unquestioned. In *Buchanan vs. McClure*, 1 *Binn*, 385, it was held that settlements on Indian lands give no right of pre-emption. See also *Mitchell vs. Cobb*, 13 *Ala.*, 137. Improvements on wild land not purchased from the Indians give the settler no title, though he continues his settlement after the purchase. *White vs. Kyle*, 1 *S. & R.*, 515; *Gillespie vs. Cunningham*, 2 *Humph.*, 19. Rights of pre-emption cannot be acquired to lands whilst the Indian title to occupancy remains. *Russell vs. Beebe, Hempst., C. C. R.*, 704; *Pintard vs. Goodloe, id.*, 502; *Dred Scott vs. Sanford*, 19 *How.*, 404; *Chinn vs. Darnell*, 4 *McLean*, 440.

The supreme court of the United States, in *Danforth vs. Wear*, 9 *Wheat*, 675, said: "As to lands surveyed within the Indian boundary, this court has never hesitated to consider all such *surveys and grants as wholly void.*"

But the last enunciation by the supreme court of the United States on the subject is perfectly clear, definitive and unmistakable. Of course, it is equally authoritative. In the case of *Threadgill vs. Pintard*. 12 *How.*, 37, the court say of this same territory acquired from the Quapaw Indians, and of this same act of 1814 upon which the Percifull claim is based: "It

must be conceded that the first settler upon this land, the Indian title to it not having been extinguished, *could claim under the act of* 1814 *no pre-emption right. No laws giving to settlers a right of pre-emption can be so construed as to embrace Indian lands* Such lands have always been protected from settlement and survey by penal enactments."

The decision of the circuit court, however, was based on the idea that the Indian occupancy could in no manner affect the claim of any one settling in their country to a pre-emption under the act of 1814—an extremely palpable error.

But while the position so clearly indicated by these various authorities is attacked as being indefensible, its strength is sought to be evaded by stating that the same territory had been formerly ceded to the government by the treaty with the Osage Indians in 1808. See 7 *U. S. Stat. at Large*, 107. We cheerfully give the benefit of the citation. By reference to Art. VI of that treaty it will be seen that it did not embrace any lands south of the "southwardly bank" of the Arkansas river. If it had included these lands we are not able to see how it would affect the question, since the United States afterwards acknowledged the title of the Quapaw Indians by purchase, and so is now estopped from denying it. *Sherwood vs. Vanderburg*, 2 *Hill*, 307; *Bowne vs. Porter*, 17 *Wend.*, 164; *Davis vs. Darrow*, 12 *id.*, 67; *Hitchcock vs. Harrington*, 6 *Johns*, 293; *Collins vs. Terry*, 7 *id.*, 279; 2 *id.*, 123; 19 *Maine*, 69; 1 *id.*, 183; 12 *Wend.*, 57; 14 *Johns.*, 225. And since this court has expressly decided that there could be no pre-emption on these lands under the act of 1814, in *Threadgill vs. Pintard*, *ubi sup.*, the evasion is wholly frivolous.

7. After all, the pre-emption laws were mere gratuities to the settler. His irruption on public land was a mere trespass, for which he was punishable by law; but if he did it for actual inhabitancy and cultivation, the pre-emption laws not only condoned the offence, but also gave him the preference right to enter the land. This was a privilege conceded, not a right obtained. Doubtless this action on the part of the government

was the result of *motives*, having in view the public good, but there was nothing like a legal *consideration*.

Much has been said since this litigation begun of the merits of the early pioneers, who fled from the vices of civilized life, and buried their discontent in the unbroken forest. Admitting that these pictures have not been overdrawn, that the hunter's life is the most meritorious of all, and that John Percifull was the most deserving of his class, it still remains difficult to percieve how Hale can have succeeded to these personal qualities, or how Percifull's virtues can be imputed to him. Percifull's heirs have no longer any interest here to be served; and if any one has been subrogated to the traits of their ancestor, it must be Paxton, on whom he himself, it may be supposed, conferred them. Before this court of chancery Hale can only appear as having purchased from the heirs a more than doubtful title, on speculation; and that title must be adjudged commensurate with the legal rules, and no wider.

But as Percifull could not transfer those personal considerations upon which the favor of the government was based, if it had ever had any existence, so he could not, the better opinion seems to be, transfer the pre-emption right itself.

It has been held in many cases that a conveyance by a pre-emptor before the issuance of a patent is absolutely void. *Glenn vs. Thistle*, 23 *Miss.* (1 *Cush.*,) 42. He can neither convey nor encumber his title. *Craig vs. Tappin*, 2 *Sankf. Chy.*, 78. In Louisiana it is held that a pre-emptor cannot transfer his right until he has obtained a receipt from the receiver. *Moore vs. Jordan*, 44 *La. An.*, 414. In *Terison vs. Martin*, 13 *Ala.*, 29, the court said: "But no case has been found, and we apprehend none exists, where assignments, or sales, of pre-emption rights before the entry was made in the land office, have been upheld." In *Forbis vs. Bowen*, 1 *A. K. Marsh*, 407, the court held that if the claimant is the assignee merely of a settler, the pre-emption preference is lost.

8. The bill asserts that by the third section of the act of March 1, 1843, which provided that every settler on land south

of the Arkansas river should be entitled to the same benefits accruing under the provisions of the pre-emption act of 1814, as though he resided on the north side of that river, the difficulty as to the Indian title was removed. See 5 *Stat. at Large*, 603. This question has been set at rest by the decision of this court on error from the law courts.

By act of April 20, 1832, 4 *Stat. at Large*, 505, congress passed an act reserving four sections of land at the Hot Springs for the future disposal of the United States. Now the supreme court, *Hale vs. Gaines*, 22 *How.*, 160–1, say: "A claim is set up in defence that John Percifull was entitled to a preference of entry under the act of 1814, which act, it is insisted, was revived by that of 1843, section 3. Suppose that Percifull's right to appropriate the land in dispute was undoubted, and that the register and receiver had allowed the heirs of Belding to enter wrongfully; still the courts of Arkansas, in this action of ejectment, had no right to interfere and set up Percifull's rejected claim. *But this is of little consequence, as when the act of April, 1832, was passed, reserving the Hot Springs from sale, Percifull had no vested interest in the land that a court of justice could recognize.*"

9. The last claim set up in Hale's bill is one which is inconsistent with all others. It is, that as Belding was his tenant when the act of May 29, 1830, giving pre-emptions, was passed, his title would enure to the benefit of Percifull as his landlord, and to Percifull's vendee, by equitable estoppel. We cannot see how Belding would be a trustee for Percifull, unless the latter had a valid claim to the pre-emption under the act of 1814. Nor how Belding could be a trustee for Percifull, when this court has declared that the latter had no claim which "*any court of justice*" could recognize.

If Percifull had no right to his pre-emption, then he was not injured by the establishment of Belding's pre-emption. It is very usual for one person to enter out the improvements of another who has not attained a pre-emption right, and the law does not consider that as an injury to the person claiming the

improvement. The purchase from the government in such case gets the improvement and all by his simple entry, and no one has a right to complain. *Graham vs. Boark*, 23 *Ark.*, 19. It is evident that Percifull could not himself claim a pre-emption under the act of May 29, 1830, since the act restricted the right to a settler or occupant who was *then* in possession and cultivated any part thereof in 1829. *Sec.* 4, *Stat. at Large*, 420. Percifull was not in possession when that act was passed, nor had he cultivated in 1829. This may have been a benefit to Belding, but it was no injury to Percifull. In bringing about this state of facts, no fraud in Belding is shown; he at no time foresaw the passage of such a law; he did not deprive Percifull of any right, because Percifull had none in the premises to lose; nor had he intercepted any favor that was on its route to Percifull, because he was in every way excluded from this bounty. Fraud must be accompanied by *injury* in order to entitle a party to redress, and unless Percifull was *damaged* he had no remedy. *Cunningham vs. Ashley*, 12 *Ark.*, 303, 320; *Jones vs. Reyburn*, 11 *id.*, 389; 1 *Sto. Eq., Jur., sec.* 203; *Hall vs. Thompson*, *Smedes & M.*, 489; *Young vs. Bumpass*, *Freeman's Chy. R.*, 250; *Juzan vs. Toulmin*, 9 *Ala.*, 684; *Conrad vs. Nicholl*, 4 *Pet.*, 296, 310; *U. S. vs. Arredondo*, 6 *id.*, 716; *Meux vs. Anthony*, 11 *Ark.* 418; *Edmundson vs. Hildreth*, 16 *Ill.*, 215. *Cunningham vs. Ashley*, 12 *Ark.*, 303. *Wynn vs. Morris*, 16 *Ark.*, 434. *Cook vs. Cook*, 12 *id.*, 387.

In *Hoofnagle vs. Anderson*, 7 *Wheat.*, 212, it is also held that if the proceedings on which an entry is founded be irregular, the government, *but not one having no prior equity*, can take advantage thereof. See also *Wynn vs. Garland*, 16 *Ark.*, 471, 452; *Rice vs. Harrell*, 24 *Ark.*, 402.

The argument proceeds on the general and familiar principle that a tenant cannot deny his landlord's title. This is a rule, however, to which there are abundant exceptions. Thus the tenant may deny the landlord's title, after the end of the time, and he may show that the landlord's title has expired. *Smith's*

Landlord and Ten., 81; *Co. Litt.*, 476; 57 *Eng. Common Law*, 400; 2 *Smith's L. C.*, 660; 1 *Vermont*, 302.

The pre-emption act of April 29, 1830, gave the pre-emption to the person "now in possession," emphatically, and not to his landlord, nor another. Otherwise such investigations would have subjected the actual settlers to litigation with the spurious claims of absentees, and the bounty of the government would have been transformed into the means of oppression. One man, by having a number of tenants disseminated over the country, would have usurped large quanties of the public domain.

Most favorably considered, an improvement is only a chattel. *Pelham vs. Wilson* 4 *Ark.*, 289. Whoever enters the land rightfully, also gets the improvement, and he is under no obligation to pay for it; and even a promise made by him afterwards to pay for it is void for the want of any consideration. *McFarland vs. Mathis*, 10 *Ark.*, 560; *Floyd vs. Ricks*, 14 *Ark.*, 290; *Graham vs. Roark*, 23 *Ark.*, 23.

Time and again the land-officers have decided against such claims preferred by landlords. See 2 *Land Laws, Instructions and Opin.*, 467, 542; 3 *id.*, 129, 182, 188.

A settler on wild land, though he enter under a bad title from another supposed to be good, may acquire a pre-emption right. *Jennings vs. DeCordova*, 20 *Tex.*. 508.

In *Kennedy vs. Wiggins*, 5 *Humph.*, 127, the tenant was held to be entitled to the pre-emption, and that the landlord could not claim the land. To the same effect are *Reese vs.* (*David*) *Crockett*, 3 *Yerg.*, 133; *Loftus vs. Mitchell*, 3 *A. K. Marsh*, 594; *Davis vs. Gray*, 3 *Littell*, 450.

So the commissioner of the general land office wrote on the 25th of November, 1851 (*Tr. p.* 98,): "On the 26th of August last this office returned the papers with its decision adverse to the claims of the heirs of John Percifull, and in favor of that of the heirs of Ludovicus Belding, it agreeing with you both, (the register and receiver at Washington, Ark.,) as to the establishment of the facts of cultivation in 1829, and possession on the 29th of May, 1830, *and regarding the objections of the receiver, founded*

upon the opinion that those acts were performed as the tenant of another, as not affecting the validity of the claim."

10. CHEROKEE CLAIM.—Hale, in a paroxysm of desperation, on the 16th of October, 1850, (*Tr. p.* 128,) attempted to fix the land by locating on it a Cherokee pre-emption. We do not suppose that he was acting under legal advice, or that the claim is now considered as anything more than surplusage and impertinent matter in this proceeding. When the case was in this court, (22 *How.*, 156,) counsel nor court ever alluded to it by a passing observation. It could not be valid. The land had eighteen years before been reserved from entry by act of April 20, 1832, (4 *Stat.* 505.)

RECTOR'S NEW MADRID CLAIM.

By the act of February 7, 1815, 4 *Stat. at Large* ,211, it was provided that any person owning land in New Madrid county, Missouri territory, materially injured by earthquakes, should be authorized to locate the like quantity of land on any of the public lands of that territory. *the sale of which was authorized by law.* But no person could locate more than six hundred and forty acres, but might in any case enter as much as one hundred and sixty acres, though his injured land might not be so much. The title to the injured land reverted to the United States. In making this exchange, the following steps were prescribed: 1. The claimant must prove his right to the exchange before the recorder of land titles. 2. The recorder thereupon paid him a certificate verifying his claim. 3. This certificate was to be located by the deputy surveyor of the territory, who was to make a survey and return a plat to the recorder with notice in writing designating the tracts thus located, which notice and plat were to be recorded. 4. The recorder was to transmit a report of the claims allowed to the commissioner of the general land-office. 5. The recorder was to give to the claimant a certifiate stating the circumstances of the case, and that he was entitled to a patent. 6. This certificate the claimant was to file with the recorder within twelve months from its date. 7. The recorder

then issued to the claimant a certificate showing these facts. 8. This certificate, on being transmitted to the commissioner of the land-office, entitled the claimant to a patent.

In the case of *Rector vs. Ashley*, 6 *Wallace*, 143, the court held that: "In perfecting a title to land located under the act of February 17, 1815, for the benefit of the inhabitants of New Madrid, no vested interest in the land, nor any appropriation of it binding on the United States, was effected until after the survey was made and returned into the office of the recorder of land titles."

The bill declares that the recorder of land titles for Missouri territory issued his certificate of November 26, 1818, whereby it was made known that Francis Langlois, being the owner of lands injured by earthquakes, was entitled to locate two hundred arpents of land on any of the public lands of the territory of Missouri, the sale of which was authorized by law. (*p.* 247). That Story, as the attorney in fact of Langlois, on the 4th of January, 1819, assigned the certificate to Samuel Hammond. That Elias Rector, the father of the plaintiff, was a joint owner of the certificate, and that they, on the 27th of January, 1819, applied to the surveyor-general of the territory for the location of the certificate on the Hot Spring land. That the surveyor-general instructed James S. Conway, his deputy, to make the survey, and that he made it on the 16th of July, 1820, and that the survey was returned to the office of the surveyor-general. That the public surveys were never made of the land in the vicinty of the Springs, and including them, until 1837, when it was done by John C. Hale, under contract with Edward Cross, the surveyor-general of Arkansas; at which time he resurveyed the Langlois location, which surveys were returned to the surveyor-general of Arkansas, and that the surveyor-general forwarded to Frederick R. Conway, the recorder of land titles, this resurvey of the Langlois claim, which was approved; and that he issued his certificate, No. 435, declaring that Langlois, or his legal representatives, was entitled to a patent for his location of 170:15-100ths acres, situated in the State of Arkan-

sas, township and range not mentioned. This certificate is dated June 16, 1838. The old survey was never filed with the recorder of land titles, but an effort is made to have this survey by Hale answer its place. The bill admits that there is no evidence that a plat of the survey of July 16, 1820, was ever returned by the surveyor-general of Illinois, Missouri and Arkansas to the recorder of land titles.

April 9, 1818, Congress passed an act requiring the New Madrid claimants to produce evidence in support of their claims before the recorder of land titles *on or before the first day of January then next;* otherwise no certificate should issue. 3 *Stat.* 417.

April 26, 1822, Congress passed an act providing that locations of New Madrid claims, under act of February 17, 1815, *if made in pursuance of that act in other respects* should be perfected into grants in like manner as if they had conformed to the public surveys; *and that all such warrants should be located within one year after the passage of that act; in default whereof the same should be null and void.* 3 *Stat.* 668.

March 2, 1827. This act has relation only to claims for injury to lots and out-lots in the two villages of New Madrid and Little Prairie; and as Langlois' land did not lie in either of these villages, this act has no bearing on the present case. 4 *Stat.*, 219.

March 2, 1831. Legal owners of certificates filed under the act of 1815, located on lands adjudged to be subject to pre-emption, might locate them on any land subject to entry at private sale; *Provided,* all claim to the previous location be relinquished; *and, provided,* that such new locations be made and patents issued therefor, under the same regulations and restrictions as if the locations had been made under the provisions of sec. 2 of the act of April 26, 1822; *i. e.* to conform as near as practicable to the lines of the public surveys. In force for eighteen months. This only gave the right to *float* the location where the land had been appropriated by a pre-emption. 4 *Stat.*, 482.

March 1, 1843. That locations made under the act of 1815, on lands on the south side of the Arkansas river, *if made in pursuance of the provisions of that act in other respects*, should be perfected into grants in like manner as if the INDIAN TITLE to the lands on the south side of said river had been completely extinguished at the time of the passage of that act.

SEC. 2 gave the right to *float* the New Madrid certificate wherever it had been located on lands which *had been appropriated by the United States.* 5 *Stat.*, 603.

It will be seen that two claims are preferred by Rector, or one claim on two distinct grants; first, under survey made on the 16th of July, 1820, and, second, under the survey of 1838.

By the survey of 1820 Rector procured no vested interest in the land, because, as we have seen, that could not occur until the survey, with the plat, notice, etc., was returned to the recorder of land titles, and approved by him, and recorded; at which time, in contemplation of law, the exchange of lands took place. *Bagnell vs. Broderick*, 13 *Pet.* 436; *Barry vs. Gamble*, 3 *How.*, 51; *Lessieur vs. Price*, 12 *id.*, 60; *Rector vs. Ashley*, 6 *Wallace*, 142; *Rector vs. Gaines*, 19 *Ark.*, 84.

2. But the attempted location in 1820, even if it had been perfected by a return to the recorder of land titles, would have been void, because such claims by the act of 1815 could only be located on lands which were public, *and the sale of which was authorized by law.* When this act passed, the sale of the Hot Spring lands was not authorized by law. They were still in the occupancy of the Indians, and their title had not been extinguished. Besides, the land had never been surveyed so as to be liable to sale, and it had never been offered for sale. This was expressly held to be fatal in *Hale vs. Gaines*, 22 *How.*, 158. Besides, the survey itself was not properly proved. The only authentic evidence of a proper survey would have been by certified copy of the same remaining of record in the office of the surveyor-general, or principal deputy-surveyor of Missouri

Territory. This survey was nothing more than a private survey, and was held to be such. 22 *How.*, 158.

The claim, under the survey of 1838, is equally unfounded:

I. Because, after the admission of Arkansas as a state in 1836, there was no authority in the surveyor-general of Arkansas to order a survey to be returned to the recorder of land titles in Missouri.

II. By act of April 26, 1822, the time for making locations of New Madrid claims was limited to *one year from that date*, at which period they were to become *void* if not before located. And this court held that this claim *did become void on that day*, and that it was not revived by the act of 1843. *Hale vs. Gaines*, 22 *How.*, 159.

III. The land had already been reserved from sale by the act of April 20, 1832, and so far from being land the sale of which was authorized by law, its sale was expressly forbidden and Hale had no right to make such a survey.

IV. Because Belding had acquired the land by pre-emption under the act of May 29, 1830. This pre-emption would necessarily prevent the location of a New Madrid certificate on the land, as Rector had acquired no vested interest in the land at the time. *Lytle vs. State*, 9 *How.*, 334; *McAffee vs. Keirn*, 6 *Sm. & M.*, 789; *Taylor vs. Brown*, 5 *Cranch*, 234; *McArthur vs. Browder*, 4 *Wheat.*, 488; *Fenley vs. Williams*, 9 *Cranch*, 164; *Isaacs vs. Steele*, 3 *Scam.*, 79; *Benner vs. Manlove, id.*, 439; *Gaines vs. Hale*, 16 *Ark.*, 9; *Wynn vs. Morris, id.*, 434.

The record of the chancery suit of *Rector vs. Langlois*, in the Hot Spring circuit court in chancery, is not admissable in evidence in a suit between *Belding's heirs* and *Rector*. A decree is only conclusive between parties and privies, and in relation to the same subject matter of litigation. *Trammell vs. Thurmond*, 17 *Ark.*, 203.

BELDING'S CLAIM.

The validity of this claim is not now in question. The plaintiffs have asserted the validity of their titles, and they must

sustain them, or their bills must be dismissed. They must recover, if at all, on the strength of their own titles, and not on the weakness of that of the defendant. *Rice vs. Harrell*, 24 *Ark.*, 402.

Belding's pre-emption is claimed under the act of May 29, 1830. 4 *Stat.*, 420. That act provides "that every settler or occupant of the public lands, prior to the passage of this act, who is now in possession and cultivated any part thereof in the year 1829, shall be and he is hereby authorized to enter with the register of the land office for the district in which such lands may lie, by legal subdivisions, any number of acres not more than 160, or a quarter section, to include his improvement, upon paying to the United States the then minimum price of said land;" but it was not to apply to any land reserved to the United States, or any of the States. And by the 4th section, proof and payment must be made before the day appointed for the commencement of the sale of lands, including the tract or tracts on which the right of pre-emption should be claimed.

This land was then undoubtedly subject to pre-emption. The Indian title had long been extinguished; it was public land; no reservation of it had been made. The proof that Belding actually occupied the land and had cultivated it in 1829, is clear and conclusive. Both the register and receiver agreed on this, and to this point the concurrence of the commissioner of the general land office was decisive. A reference to the evidence of the witness will clearly show that Belding fulfilled all the conditions of the law. No one else cultivated in 1829, and he was in possession, and an "occupant" when the act passed. The act under which Percifull claimed, of April 12, 1814, required inhabitancy and cultivation, but the act of May 29, 1830, required no more than previous cultivation and settlement, or occupancy.

It is not, therefore, necessary to show that Belding actually lived on the land on the 29th of May, 1830, but it is sufficient to show that he occupied it by his agents, and the evidence on

that subject cannot be contradicted. He kept a store, as was stated by Calloway, the sheriff of the county in those days, in 1828, 1829 and 1830. and till the last of the summer in the latter year. In a similar case, under the same law, the court said: "The cultivation (by a woman) of the tract of land in question in 1829—either by herself or some one for her—and her possession of it on the 29th of May, 1830, may be regarded as fully enough established, her *residence all the time being on section seven*," and adjoining section. *Wynn vs. Morris*, 16 *Ark.*, 426. And under this law, "where the pre-emptor has equal right by virtue of cultivation and possession to several tracts of public land, he was held not to have abandoned either, until he had made his election at the last moment." *Id.*, 436.

The lands were not surveyed, but the law was not confined either by letter or spirit to surveyed lands. See *Hendrick's Opinion.* "We have no doubt that there was a sufficient adjudication of the claim of Belding's heirs, to authorize the instructions given by the commissioner of the general land office." *Gaines vs. Hale*, 16 *Ark.*, 19.

If Belding was thus entitled to a pre-emption, his interest in the land vested immediately; vested on the passage of the act. This court, in *Brown vs. Clements*, 3 *How.*, 666, said: "The act of the 29th of May, 1830, to grant pre-emption rights to settlers on the public lands, *appropriated* this quarter section of land on which Ethridge was then settled to his claim under the act for one year; subject, however, to be defeated by his failure to comply with its provisions. During that time this quarter section *was not liable to any other claim*, or to be sold to any other person, except at public sale under the proclamation of the President of the United States; and that Ethridge had a right to prevent, by paying for it under the act."

On the 14th of July, 1832, Congress passed an act providing that all occupants and settlers on public lands, entitled to a pre-emption under the act of May 29, 1830, and who could not make proof and enter the same within the time limited in said act in consequence of the public surveys not having been made

sustain them, or their bills must be dismissed. They must recover, if at all, on the strength of their own titles, and not on the weakness of that of the defendant. *Rice vs. Harrell*, 24 *Ark.*, 402.

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and returned, or where the land was not attached to any land district, should be permitted to enter the said lands on the same conditions as prescribed in said act within one year after the surveys should be made. 4 *Stat.*, 603.

Within the time prescribed by this act Belding made his proof, and offered to pay for the land. The lands were surveyed in 1838, and plats furnished the register at Washington, Arkansas, in June, 1838; and in March, 1839, proof of Belding's claim was made before the register and receiver.

But was the claim of Belding good as against the reservation of April 20, 1832? This act of April 20, 1832, and that of July 14, 1832, giving further time to prove pre-emptions under the act of May 29, 1830, were both passed at the same session of Congress, and are *in paria materia*, and are to be construed together, and in such manner that due effect and meaning shall be given to each, according to the intention of the national legislature. We cannot consent that Congress by the joint operation of these two laws meant to affect rights which one of them admitted to be already vested, and which had not been perfected only because they could not be; and which failure was excused, because the law never requires a man to do that which he cannot possibly perform. *Broome's Leg. Max.*, 181. Congress therefore meant to reserve the Hot Springs from any future claim, but not from entry under any right recognized as being previously vested under the law.

We have seen that Belding had a right to the land under the law; that right was acknowledged by the act of July 14, 1832; for it could not have been intended to pass a law relieving a large class of men from a difficulty, brought about by no fault of their own, and to exclude Belding, as if by name, from its benefits. And no reservation of land can be made after a citizen has acquired a right to it under a pre-emption law. *U. S. vs. Fitzgerald*, 15 *Pet.*, 407; *Brown vs. Clements*, 3 *How.* 666; *Lytle vs. State*, 9 *How.*, 333.

Precisely the same point was decided in the case last mentioned, *pp.* 334, 335, as that involved here. Cloyes claimed a pre-emption likewise under the act of May 29, 1830, the benefits of which were extended by the act of July 14, 1832. But before the passage of the latter act, Congress, on the 15th of

June, 1832, made a grant of 1,000 acres of land to the state of Arkansas, which was located on the same land; and the court held that the pre-emption was good, and said: "By the grant to Arkansas Congress could not have intended to impair vested rights. The grant of the thousand acres, and of the other tracts must be so construed as not to interfere with the pre-emption of Cloyes." See also *Marks vs. Dickinson*, 20 *How.*, 501; *Stephens vs. McCargo*, 9 *Wheat.*, 502; *Doe vs. Stephenson*, 9 *Tanner*, (*Ind.*,) 148; *Lytle vs. State*, 17 *Ark.*, 644; *Wynn vs Morris*, 16 *Ark.*, 414.

Now the act of April 20, 1832, merely *reserved the land from sale*, that is, the government declared that whatever *interest* she then held should be reserved; the act does not profess to extinguish any title which had already accrued; and when the act of July 14, 1832, was passed, whereby further time was given to pre-emptors to prove up their claims, under the act of May 29, 1830, it was necessarily a repeal of the reservation: since the claim of Belding was in no manner excluded. To hold otherwise would be to say that Congress on the 20th of April destroyed a right which afterwards, on the 14th of July, it solemnly recognized; and that this recognition should pass for nothing.

In *Rector vs Gaines*, 19 *Ark., p.* 80, the court said: "But following the lead of the supreme court at Washington, as the authoritative expounder of the acts of congress, we hold, as that court did in the case of *Lytle vs. State*, 9 *How.*, 314, under a state of case more emphatically against such an idea—because there, there was an absolute grant of land by congress, and not a mere reservation of it as here—that the pre-emption right of Belding operated as a prior and intermediate appropriation of the land, having relation to the pre-emption act of the 29th of May, 1830, at which time the right vested, though subsequently perfected under the act of congress of the 14th of July, 1832. The same construction we have since applied in the case of *Wynn vs. Morris*, 16 *Ark.*, 414, *and Lytle vs. State*, 17 *Ark.*, 608."

By an examination of the cases decided in this same litigation, on error, it will be seen that every principle involved in this suit has been discussed; has been considered and decided adversely to Rector and Hale. The litigation has long ago been closed for all practical purposes. In *Evans vs. St. Louis Public Schools*, 32 *Missouri*, 27, it was properly held that the plainti's title having been held by the supreme court of the United States to be void, he could not file a bill to hold the defendant a trustee for his use.

And these decisions made on this same subject are final. *Story vs Livingtun*, 13 *Pet.*, 367; *Nelson vs. Hubbard*, 13 *Ark.*, 256.

These decisions embrace the following points:

1. As to Hale's claim: That "when the Act of April, 1832, was passed, reserving the Hot Springs from sale, Percifull had no vested interest in the land which a court of justice could recognize." Hale vs. Gaines, 22 How., 161. Hale does not pretend to have acquired any rights since that time.

2. As to Rector's claim: The Court, in speaking of the first survey, said: "In 1818 the springs were in the Indian country, to which, of course, no public surveys extended. And as the act of 1815, providing for the New Madrid sufferers, only allowed them to enter their warrants on lands, 'the sale of which was authorized by law,' the unsurveyed lands could not be legally appropriated; and, of necessity, the surveyor-general disregarded the application to have a survey made for Langlois. And thus the claim stood from 1818 to 1838." And then, after discussing the last survey of 1838, the court said: "We are of the opinion that the New Madrid survey of 1838 was altogether invalid, and was properly rejected by the State courts." *Id., pp.* 158 9.

3. As to Belding's claim: In *Gaines vs Hale* 16 *Ark.*, 19 the court held that there was "sufficient adjudication of the claim of Belding's heirs to authorize the instructions given by the commissioner of the general land-office to the officers at Washington, Ark.," (to permit the entry of Belding's heirs) And that that entry was good as against the reservation of 1832. *Id., p.* 21 *et seq.*

The subsequent cancellation of the certificate of entry cannot, of course, divest Belding's heirs of any right of which the certificate was a mere evidence. They had bought the land and paid for it, and their title has in every way been sustained; and no argument can be made for either Hale or Rector which is not at the expense of express adjudications made by this court, in respect of the same litigation.

But we submit, finally, that if the premises of the court below were correct, then the conclusion was wrong. The plaintiffs below must recover, if at all, on the strength of their own titles, and not on the weakness of that of defendants.

An intruder on this land is a mere trespasser. *Boyreau vs. Campbell*, 1 *McAllister*, 119. *United States vs. Brown*, 4 *McLean*, 378. *United States vs. Fitzgerald*, 15 *Pet.*, 407; *Kissell vs. St. Louis Public Schools*, 18 *Howard* 19; *Barnard vs. Ashley*, *id.* 43; *Hempst. C. C. R.*, 665; *Hale vs. Gaines*, 22 *Howard*, 144. Being all, on this hypothesis, mere wrong-doers, no court of chancery would interfere. See particularly *Woodworth vs. Janes*. 2 *Johnson's Cases*, 417: *Cothman vs. McCoy*, 33 *Ala.*, 65; *Carey vs. Smith*, 11 *Geo.*, 539. It is not possible that one having no pretense of title can have an injunction. Respectfully,

U. M. ROSE, *for* ~~Hale et al.~~ Gaines

Supreme Court of the United States.

JOHN H. RUSSELL, Appellant,
vs.
THE UNITED STATES, Appellees. } No.

BRIEF, POINTS, AND ARGUMENT OF APPELLANT.

Henry M. Rector having filed so full, able, and complete a brief and argument in his case, which embraces the title from the United States to Francis Langlois down to himself, of the lands included in certificate number 467, the above named appellant deems it unnecessary to enter further into the discussion of the questions contained in that brief, and which have been so thoroughly and clearly presented. He concedes the title to have been in the said Rector until the transfer to h[illegible], the said Russell, at the time hereinafter stated.

STATEMENT OF JOHN H. RUSSELL'S CASE.

I.

On the 5th day of March, 1867, Henry M. Rector, in consideration of the expressed sum of $10,000, sold and quit-claimed unto the said Russell all of his right, title, and interest in and to the two hundred arpents of land situate and lying in the county of Hot Springs, in the State of Arkansas, surveyed for and located by Francis Langlois, as per certificate numbered 467, and survey 2903; said certificate 467, issued by Frederick Bates, recorder of land titles, on the 26th of November, 1818, and known as the New Madrid location, covering the Hot

Springs, (Rec., p. 500,) being the same property now claimed by the said Rector. (See Petition, Rec., p. 12.) By this deed Russell became possessed of all of the Langlois and Rector interest. The consideration paid, however, was in fact bnt $1,000. (E. W. Rector's testimony, Rec., p. 511; A. H. Garland, 520.)

II.

On the day of the execution of the above conveyance, John H. Russell, for the valuable consideration of $5,000, sold and quit-claimed to the said Rector "*all of said land, except the one half of the land in dispute and litigation; and as to said land so in dispute and litigation as aforesaid, the said Rector and myself are to be and remain joint owners: Provided, that within twenty days after the adjournment of the first session of the present Fortieth Congress, I shall have secured, and shall bring and produce to the said Rector, a confirmation, entire, full, and complete, by the Congress of the United States, of the title of said Francis Langlois in and to said land as named in said certificate numbered* 467, *as now indicated; but in case I should fail to secure, and to bring and produce such confirmation of title by the Congress as aforesaid, then I am to have no claim whatever in and to said land as named in certificate numbered* 467; *and the said deed from said Rector to me of this date is to be null and void and wholly inoperative.*" It was agreed that Rector was to continue in possession and receive the rents until the production of the confirmation aforesaid, when he was to surrender possession of one half of the property conveyed. None of the consideration expressed in this agreement was ever paid. (Russell's testimony, Rec., p. 517.) Both of the above instruments were properly executed and recorded. (Rec., pp. 514, 515.)

III.

Russell, as the owner of the property in question, presented himself to Congress, as he lawfully might do, and endeavored to carry out the condition embraced in the

agreement with Rector, containing the defeasance of his title; but he did not succeed in the Fortieth Congress to obtain such confirmation of his title derived from Langlois through Rector. But it being desired on the part of Rector that the title to this property, which had been so long in dispute, should be settled in some manner as expeditiously as possible, he waived the forfeiture of Russell, which, by the terms of the last named instrument, he had incurred, and requested him to continue on, if it took a much longer time to accomplish the object he had in view. (Spicer's testimony, Rec., pp. 505, 506, and 507; J. F. Mollere, pp. 503, 504, 505; John Wilson, p. 509.)

In conformity with the wishes of Rector, and after a waiver of his right to claim the forfeiture provided for in the defeasance, and the enlargement of the time in which to provoke legislation to bring about some plan for the adjustment of the Langlois title, (see Spicer's, Mollere's, and Wilson's testimony, above referred to,) Russell continued his exertions before the committee of Congress, and these labors, it would seem, in connection with that of others, resulted in the passage of an act entitled, "An act in relation to the Hot Springs reservation in Arkansas." He went to Congress in his own behalf. He represented the Langlois claim to a title. He was not in the employment of Rector. Rector, in his conveyance, had purposely placed him in front, knowing if Russell succeeded in obtaining the legal title to himself from the United States for the whole of the land claimed under the new Madrid certificate No. 467, it would inure to his benefit and perfect in him his legal title to the one-half conveyed to him by Russell.

It is under the act above named that all the claimants comprised in the record are before this court on an appeal from the judgment in the Court of Claims.

IV.

The judgment of the court below was against all the claimants and in favor of the United States. Russell

adopts the statement of the case as presented in Rector's brief of 176 pages; and without admitting his right to present himself before the Court of Claims, or his right to stand in this court, making common cause with him against the United States; and rather than needlessly encumber the record with a voluminous brief, reasserting what has been so well asserted by Rector, he refors the court to *that* brief and argument as to the title of Langlois and his assigns down to Rector against the United States. Rector could not go before Congress, because he had conveyed away his title; and after having waived forfeiture and enlarged Russell's time for performance, Russell stood as if his contract had not expired; and if a settlement of title did not come direct from Congress, but in the way pointed out by the act of Congress above cited, it was a practical fulfillment of the terms of his covenant. Rector is now endeavoring to avail himself of the result of his efforts to comply with his obligations.

V.

Russell asks that the judgment of the Court of Claims may be reversed; and if the court should proceed to pass upon the rights of the claimants and appellants, *inter partis*, he prays that the title be decreed to be in him. The Court of Claims did not touch upon the question of the superior title as between claimants when these cases were before it, and it is not in this court on appeal from any decision of that court.

VI.

Have both Rector and Russell a right to stand in the Court of Claims and this court and prefer their individual claims to the property in dispute? If not, who has the better right to claim the attention of the court? The act of Congress, however, provides, in sec. 1, "That any person claiming title, either legal or equitable, to the whole or any part of the four sections of land constituting what

is known as the Hot Springs reservation in Hot Springs county, in the State of Arkansas, may institute against the United States in the Court of Claims, and prosecute to a final decision, any suit that may be necessary to settle the same." Is this act comprehensive enough to include the settlement of conflicting claims between the grantors and grantees claiming through the same chain of title and through the same grantors?

Langlois having assigned his certificate, he or his heirs could not come in now and set up a claim, neither could Samuel Hammond, who was an assignee of Langlois, because he had conveyed all of his interest in the location to the ancestor of Henry M. Rector. Nor has Rector any right here in court—he conveyed all of his interest to Russell by deed, March 7, 1867, (Rec., p. 500)—unless it be to assert his right to the interest conveyed to him by Russell. If Russell acquires title to the property it will enure to the benefit of Rector to the extent of that title. If there be any dispute between Rector and Russell about their deeds, let Rector bring Russell into court having jurisdiction and have the matter judicially settled. Russell holding the direct line of conveyances of the Langlois title, and being the last grantee, he will be held to exclude all others and to have succeeded to all of the interest comprised in certificate 467 and survey 2903. And so long as the question of forfeiture under the defeasance is an open one, if either claimant has to be dismissed, Rector must go out of court. Since Russell is asserting his title, Rector is not necessarily here.

Argument.

I.

1. The deed of Rector to Russell (p. 500) conveyed to him, for the actual consideration of $1,000, all his right, title, and interest in the described premises, and vested in him a perfect title.

2. "A deed of bargain and sale, signed, sealed and de-

livered, acknowledged and recorded, is an actual transfer of land to the grantee, as much as the delivery of a sum of money or of a personal chattel is a transfer of either of them." (Worcester *v.* Eaton, 11 Mass., 375.)

II.

1. But it is claimed that on the same day that Russell conveyed to Rector all of said land, except the one-half of the land in dispute and litigation, and as to that they were to remain joint owners.

2. That a condition was embodied in that deed as follows, to wit: Provided, That within twenty days after the adjournment of the 1st session of the present 40th Congress, he should have secured and produced to said Rector a confirmation by Congress of the title of Francois Langlois, and that if he failed to do it he was to have no claim whatever to the land in question, and that Rector's deed to him was to be null and void and wholly inoperative. Rector was to remain in possession and receive the rents until the confirmation of the title, when he was to surrender to Russell his interest. (Rec., p. 514.)

The expressed consideration of this instrument was $5,000, but no money was paid by Rector to Russell. (Rec., p. 517.)

3. The Court of Claims finds that the above-mentioned "instruments were executed and exchanged at one and the same time, and were parts of the same transaction." (Rec., p. 578.) They bear within themselves the evidence of the fact that they relate to the same transaction.

4. Russell entered into the latter contract, so far as may be gathered from its contents, or from anything he said, for a legitimate purpose, and the court will not presume in the absence of proof that he did anything that was improper or unlawful, or that he at first proposed to do so.

5. He had a right to make the purchase, and a right to

petition Congress, and to go before the proper committee and present his claim for a confirmation of his title. Nothing is shown that he did otherwise, and he here claims he did not.

Marshall *v.* B. & O. R. R. Co., 16 How., 314.
Wood *v.* McCann, 6 Dana, 366, and also case decided this term of this court.

6. These instruments were properly executed, delivered, and recorded. (Rec., pp. 500, 514.)

7. The first vested in Russell an absolute title, and the reconveyance to Rector left one-half interest in Russell, to be divested only by his execution of a conveyance or the actual occurrence of a forfeiture.

III.

1. The conveyance of Russell to Rector imposed a duty which Russell was to carry out by a specified time.

2. He was to present himself to Congress and ask for a confirmation of the Langlois title.

3. He was to present his own title as the foundation of his own right to memorialize Congress on this subject.

4. The recognition of the title acquired under the Langlois certificate 467, or any confirmation of it, would inure to the benefit of every subsequent grantee or assignee.

Fairbanks *v.* Williamson, 7 Greenl., 96.
Kent Com., 9 ed., vol. 4, page 147.
~~Hermer *v.* Morris, 6 McLean, 44-48.~~
Hermer v. Morris, 6 McLean, 44-48.

5. He was no agent or attorney of Rector, and represented no one but himself.

6. If Russell failed in performing the condition set forth in the defeasance in his deed to Rector, the penalty was a forfeiture of the interest retained by that conveyance.

7. Rector claims that Russell failed to fulfill the condi-

Sweet & Co. vs Kinney, 6 McLean 1

tions contained in that deed by not procuring a confirmation of the Langlois title within the time specified. This Russell concedes, but alleges and proves a waiver of forfeiture by Rector, and a continuance of his efforts to bring about a settlement of title.

Spicer's Testimony, Rec., pp. 505, 506, 507.
J. F. Mollere, Rec., pp. 503, 504, 505.
John Wilson, Rec., p. 509.
S. R. Harrington, Rec., p. 502.

That by his exertions he provoked the passage of the present bill. To that end he labored before the committee.

Testimony of J. F. Mollere, Rec., p. 505.
Testimony of John Wilson, Rec., p. 509.

8. This court sits as a court of equity in these cases, and courts of equity do not favor forfeitures, and a waiver will be considered with favor to the offender.

Lang *et al. v.* Holbrook, Crabbe, U. S. Dist. Repts., p. 179.
Henry *v.* Tupper, 29 Vermont, 358.
1 Greenl. on Ev., § 304.
Merrifield *v.* Cobleigh, 4 Cush., 178.
7 Conn., 45; 2 N. H., 120, ~~150; 14 Wend., 590.~~
Byrd *v.* Bertrand, 7 Ark., 321.
Chalker *v.* Chalker, 1 Conn., 79.
Smith *v.* Jewett, 40 N. H. Repts., 530.
2 Story's Equity Jurisprudence, §§ 1323, 1325*a*, 1319.

9. A forfeiture once waived can never afterwards be claimed.

Chalker *v.* Chalker, 1 Conn., 79.
1 Hilliard Real Property, p. 526, § 25.

10. And this is especially so where the terms of the instrument prescribing the forfeiture constitute a condition subsequent, as in this instance.

Livingston *v.* Tompkins, 4 ~~Paige,~~ 415.
Warner *v.* Burnette, *et al.*, 31 Conn., 468.
2 Story's Equity Jurisprudence, §§ 1319, 1325*a*.

11. Even where a condition provides that the estate shall shall be void on non-performance, the estate is not defeated without some act or declaration of the grantor.

1 Hillard Real Property, 531, § 17.

DEFEASANCE AND CONDITION.

1. A defeasance is defined as a collateral deed, made at the same time with a feoffment or grant, containing certain conditions, upon the performance of which the estate thereby created may be defeated.

2 Hilliard on Real Property, p. 465, § 76.

1 Bouvier Law Dic., p. 445.

2. A condition is said to be a qualification or restriction annexed to a conveyance, by which, upon the happening or not happening of a particular event, or the performance or non-performance of some act by the grantor or grantee, an estate shall commence, be enlarged or defeated.

1 Hilliard on Real Property, p. 502, § 1.

1 Bouvier Law Dic., 313.

Harrison *v.* Trustees, 12 Mass., 463.

RUSSELL'S ESTATE.

1. The deed of Rector to Russell gave an absolute estate.

11 Mass., above cited.

2. The conveyance of Russell to Rector left in him a moiety, and the waiver of forfeiture by Rector still leaves in him the portion unconveyed.

Taylor *v.* Mason, 9 Wheat., 325.

Finley *v.* King, 3 Peters, 346.

3. The continuance of Russell, after the time limited in the defeasance, with the consent and under the direction of Rector, until the passage of the act remitting all parties to the Court of Claims to have their rights definitely settled, entitled him to go into the Court of Claims and to come here for the purpose of obtaining that confirmation of the Langlois title contemplated in the conveyance to Rector.

4. That he filed his petition and claimed the whole of the land is perfectly consistent with his agreement with Rector, and indeed is within the purview of its terms. If he should be decreed the title to the whole, he still would have left only what was not conveyed to Rector. And if he had failed to come into the Court of Claims he would be justly chargeable with laches.

5. Rector's motives for conveying to Russell and putting him to the front, may possibly be explained on p. 504 of the Record, in the testimony of Mollere.

RECTOR ALLEGES THAT THE AGREEMENT ENTERED INTO WITH RUSSELL WAS FOR AN UNLAWFUL PURPOSE, AND AGAINST PUBLIC POLICY.

1. H. M. Rector in his brief in the case of Russell, p. 7, subdivision 3, states that, "The arrangement was but a device to give semblance of legality to a bargain not enforceable in law." This was not Russell's purpose; but as the deed with the defeasance was drawn by A. H. Garland, Rector's attorney, he ought to be presumed to know. Russell does not concede this.

2. That by reason of such purpose, his deed to Russell and Russell's deed to him are nullities, and that he was never divested of the estate.

THE LAW OF THIS QUESTION.

1. The deed of Rector to Russell was a positive grant; and if the deed of Russell to Rector is to be taken as part of it, the proviso it contained was a condition subsequent, and Russell would not be divested of the estate until the forfeiture had occurred.

If a condition subsequent was void at its creation, or becomes impossible, unlawful, or in any way void, the estate remains intact and absolute.

Taylor *v.* Sutter, 15 Ga., 103.
2 Blackstone's Commentaries, 157.
State *v.* R. E. Bank, 5 Ark., 576.
1 Hilliard on Real Property, p. 509, § 12.

1 Hilliard on Real Property, p. 510, § 13.
McDonough *v.* Murdock, 15 How., 367.

Again, Rector relies upon this unlawful proviso, as he styles it, to relieve him from the operation of his deed to Russell. If it be against public policy for one purpose, it must be so for all others; what is void for Russell should be void for Rector; they are *in pari delictu.*

2. Leaving Rector to the consequences of his own allegations, all of his title to the property in question would be absolutely vested in Russell. If the court take the allegations of Rector as true, and adopt the law applicable to such a case, Russell would not complain. Yet the status of the parties, under the terms of the respective deeds, would be the same as if there were no such objection to them; they are *in pari delictu.*

3. The 11 Mass., 377, *supra*, was a deed given to property wherein the consideration of it was the compounding of a felony. The grantor being advised that it was void, regranted the premises to another party. The court refused to set it aside, remarking: "You have paid the price of your wickedness, and you must not have the aid of the law to rid you of an inconvenience, which is a suitable punishment of your offense."

RUSSELL'S POSITION.

1. A deed conveys title, though it contains covenants which have not been performed; the covenant does not affect the grant.

Day *v.* Fellman, 1 Fisher cases, 487.
Worcester *v.* Eaton, 11 Mass., 377.

2. The conditions being void, the title would rest in both Russell and Rector. Russell would therefore have a right to ask for the whole title, or to act conjointly with Rector. Rector, in claiming the whole, does so in opposition to Russell, but Russell would be a claimant for their joint benefit.

3. Russell proposes to do equity, and "he who asks

equity must do equity." A confirmance of the title derived under the Langlois certificate, to be in Russell, would work no wrong to Rector.

THE JURISDICTION CONFERRED UPON THE COURTS THE SAME AS CONGRESSIONAL ACTION UPON THE TITLE.

1. It would appear that while Russell was before Congress endeavoring to obtain a confirmation of the Langlois title, there were other claimants who were working to effect a recognition of adverse interests.

See John Wilson's testimony, Rec., p. 509.

This undoubtedly occasioned the reference of the claimants of this property to the courts, they having the appliances and the means of sifting the truth from the vast amount of oral and documentary testimony that must necessarily be produced. And also that it would be a forum much more suitable to the claimants than Congress.

2. Russell having labored effectively, as is evidenced by the passage of the act giving the courts jurisdiction to hear and determine the right of the parties, it became his duty, under the extended proviso of the defeasance, to go into court to assert his title for the benefit of both himself and Rector.

3. That Rector, upon the passage of the act referred to, should have gone into the Court of Claims and denied the rights of Russell, must be construed as an act of bad faith.

4. In case of a reversal of the judgment of the Court of Claims—and this court should hold that it having the whole case before it, it would proceed to determine the right of the claimants *inter partes*—Russell asks that the court decree him to be the undivided one-half owner and Rector to be the other undivided half owner of the land in question, and that the patent may be so ordered to be given, or that the whole title may be decreed to be in him, leaving the title to vest in Rector under his deed to him.

Respectfully submitted.

JOHN A. GROW,
of Counsel for John H. Russell.

ACTS AND PARTS OF ACTS REFERRED TO IN THE HOT SPRINGS CASES.

ACT OF MARCH 2, 1805.

[2 Stat., p. 326.]

CHAP. XXVI.—An act for ascertaining and adjusting the titles and claims to land within the Territory of Orleans and the district of Louisiana. (*a.*)

* * * * * * *

SEC. 3. *And be it further enacted*, That for the purpose of more conveniently ascertaining the titles and claims to lands in the territory ceded as aforesaid, the Territory of Orleans shall be laid off into two districts, in such manner as the President of the United States shall direct; in each of which he shall appoint, in the recess of the Senate, but who shall be nominated at their next meeting, for their advice and consent, a register, who shall receive the same annual compensation, give security in the same manner, and in the same sums, and whose duties and authorities shall in every respect be the same in relation to the lands which shall hereafter be disposed of at their offices, as are by law provided with respect to the registers in the several offices established for the disposal of the lands of the United States, north of the river Ohio, and above the mouth of Kentucky river. The President of the United States shall likewise appoint a recorder of land-titles in the district of Louisiana, who shall give security in the same manner, and in the same sums, and shall be entitled to the same annual compensation as the registers of the several land offices.

ACT OF FEBRUARY 28, 1806.

[2 Stat., p. 352.]

CHAP. XI.—An act extending the powers of the surveyor-general to the Territory of Louisiana, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the

powers vested by law in the surveyor-general shall extend over all the public lands of the United States in the Territory of Louisiana to which the Indian title has been or hereafter shall be extinguished. It shall be the duty of the said surveyor-general to appoint a sufficient number of skillful surveyors as his deputies in the said Territory, one of whom he shall, with the approbation of the Secretary of the Treasury, designate as his principal deputy for the same; which said deputies shall severally take an oath or affirmation, truly and faithfully to discharge the duties of their respective offices. The said principal deputy shall reside and keep an office in the said Territory, and shall, under the superintendence of the surveyor-general, execute, or cause to be executed by the other deputies, such surveys as may hereafter be authorized by law, or as he may be directed to execute by the commissioners appointed for the purpose of ascertaining the titles and claims to land within the Territory aforesaid; and shall generally perform therein, in conformity with the regulations and instructions of the said surveyor general, the duties imposed by law on the said surveyor general.

SEC. 2. *And be it further enacted*, That all the plots of surveys, and all other papers and documents pertaining, or which did pertain, to the office of surveyor general under the Spanish government, within the limits of the Territory aforesaid, or to any other office heretofore established or authorized for the purpose of executing or recording surveys of lands within the said limits, shall be delivered to the principal deputy aforesaid; and no plot of survey shall be admitted as evidence in any court of justice unless certified by the said principal deputy to be a true copy of the record in his office.

SEC. 3. *And be it further enacted*, That so much of the act entitled "An act for ascertaining and adjusting the titles and claims to land within the Territory of Orleans and the district of Louisiana," as makes it the duty of every claimant to lands within the Territory of Louisiana to deliver to the recorder of land titles a plot of the tract or tracts claimed by him, be, and the same is hereby, repealed so far as relates to claimants whose tracts had not been surveyed by the proper officer under the Spanish government, prior to the twentieth day of December, one thousand eight hundred and three.

* * * * *

Act of April 5, 1813.

(Referred to in act of April 12, 1814.)

[2 Stat., p 797.]

Chap. XX.—An act giving the right of pre-emption in the purchase of lands to certain settlers in the Illinois Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person, or legal representative of every person, who has actually inhabited and cultivated a tract of land lying in either of the districts established for the sale of public lands, in the Illinois Territory, which tract is not rightfully claimed by any other person, and who shall not have removed from said Territory; every such person and his legal representatives shall be entitled to a preference in becoming the purchaser from the United States of such tract of land at private sale, at the same price and on the same terms and conditions in every respect, as are or may be provided by law for the sale of other lands sold at private sale in said Territory, at the time of making such purchase: *Provided*, That no more than one quarter-section of land shall be sold to any one individual, in virtue of this act; and the same shall be bounded by the sectional and divisional lines run, or to be run, under the direction of the surveyor-general for the division of the public lands: *Provided, also*, That no lands reserved from sale by former acts, or lands which have been directed to be sold in town-lots, and out-lots, shall be sold under this act.

Sec. 2. *And be it further enacted*, That every person claiming a preference in becoming the purchaser of a tract of land, in virtue of this act, shall make known his claim by delivering a notice in writing to the register of the land office for the district in which the land may lie, wherein he shall particularly designate the quarter-section he claims; which notice the register shall file in his office on receiving twenty-five cents from the person delivering the same. And in every case where it shall appear to the satisfaction of the register and receiver of public moneys of the land office that any person who has delivered his notice of claim is entitled, according to the provisions of this act, to a preference in becoming the purchaser of a quarter-section of land, such person so entitled shall have a right to enter the same with

the register of the land office, on producing his receipt from the receiver of public moneys for at least one-twentieth part of the purchase money, as in case of other public lands sold at private sale: *Provided*, That all lands to be sold under this act shall be entered with the register at least two weeks before the time of the commencement of the public sales in the district wherein the land lies; and every person having a right of preference in becoming the purchaser of a tract of land, who shall fail so to make his entry with the register within the time prescribed, his right shall be forfeited, and the land by him claimed shall be offered at public sale with the other public lands in the district to which it belongs.

Act of April 12, 1814.

[3 Stat., p. 121.]

Chap. LII.—An act for the final adjustment of land titles in the State of Louisiana and Territory of Missouri. [April 12, 1874.]

* * * * * * *

Sec. 5. *And be it further enacted*, That every person, and the legal representatives of every person, who has actually inhabited and cultivated a tract of land lying in that part of the State of Louisiana which composed the late Territory of Orleans, or in the Territory of Missouri, which tract is not rightfully claimed by any other person, and who shall not have removed from said State or Territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same restrictions, conditions, provisions and regulations, in every respect as is directed by the act entitled "An act giving the right of pre-emption in the purchase of lands, to certain settlers in the Illinois Territory," passed February fifth, one thousand eight hundred and thirteen.

Act of March 3, 1807.

Chap. XXXVI.—An Act respecting claims to land in the Territories of Orleans and Louisiana. (a.)

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Sec. 6. *And be it further enacted*, That the commissioners appointed or to be appointed for the purpose of ascertaining

the rights of persons claiming lands in the territories of Orleans and Louisiana, shall respectively transmit to the Secretary of the Treasury and to the surveyor-general, or officer acting as surveyor-general, transcripts of the final decisions made in favor of claimants by virtue of this act, and they shall deliver to the party a certificate stating the circumstances of the case, and that he is entitled to a patent for the tract of land therein designated, which certificate shall be filed with the proper register or recorder, within twelve months after date. And the register or recorder shall thereupon (a plat of the tract of land therein designated, being previously filed with him or transmitted to him by the officer acting as surveyor-general in the manner hereinafter provided,) issue a certificate in favor of the party, which certificate being transmitted to the Secretary of the Treasury, shall entitle the party to a patent, to be issued in like manner as is provided by law for the issuing of patents for public lands lying in other territories of the United States.

New Madrid Act, February 17, 1815.

[3 Stat., p. 211.]

An Act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes.

Be it enacted, &c., That any person or persons owning lands in the county of New Madrid, in the Missouri Territory, with the extent the said county had on the tenth day of November, one thousand eight hundred and twelve, and whose lands have been materially injured by earthquakes, shall be, and they are hereby authorized to locate the like quantity of land on any of the public lands of the said territory, the sale of which is authorized by law: *Provided*, That no person shall be permitted to locate a greater quantity of land under this act, than the quantity confirmed to him, except the owners of lots of ground or tracts of land of less quantity than one hundred and sixty acres, nor shall any person be entitled to locate more than six hundred and forty acres, nor shall any such location include any lead mine or salt spring: *And provided, also*, That in every case where such location shall be made according to the provisions of this act, the title of the person or persons to the land injured as aforesaid, shall evert to, and become absolutely vested in the United States.

SEC. 2. That whenever it shall appear to the recorder of land titles for the Territory of Missouri, by the oath or affirmation of a competent witness or witnesses, that any person or persons are entitled to a tract or tracts of land under the provisions of this act, it shall be the duty of the said recorder to issue a certificate thereof to the claimant or claimants; and upon such certificate being issued, and the location made on the application of the claimants by the principal deputy surveyor for said territory, or under his direction, whose duty it shall be to cause a survey thereof to be made, and to return a plat of each location made to the said recorder, together with a notice in writing designating the tract or tracts thus located, and the name of the claimant on whose behalf the same shall be made; which notice and plat the said recorder shall cause to be recorded in his office and shall receive from the claimant for his services on each claim the sum of two dollars for receiving the proof, issuing the certificate and recording the plat and notice as aforesaid; and the surveyor shall be entitled to the same compensation for his services from the party applying, as is allowed for surveying the public lands of the United States.

SEC. 3. That it shall be the duty of the recorder of land titles to transmit a report of the claims allowed, and locations made under this act, to the Commissioner of the General Land Office, and shall deliver to the party a certificate stating the circumstances of the case, and that he is entitled to a patent for the tract therein designated, which certificate shall be filed with the said recorder within twelve months after date, and the recorder shall thereupon issue a certificate in favor of the party, which certificate being transmitted to the Commissioner of the General Land Office, shall entitle the party to a patent to be issued in like manner as is provided by law for other public lands of the United States.

ACT OF APRIL 29, 1816.

[3 Stat., p. 325.]

CHAP. CLI.—An act to provide for the appointment of a surveyor of the public lands in the Territories of Illinois and Missouri.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sur-

veyor of the lands of the United States in the Territories of Illinois and Missouri shall be appointed, whose duty it shall be to engage a sufficient number of skilful surveyors astihy deputies, and to cause so much of the land above-mentioned, as the President of the United States shall direct, and to which the titles of the Indian tribes have been extinguished, to be surveyed and divided in the manner, and to do and perform all such other acts in relation to such lands, as the surveyor general is authorized and directed to do, in relation to the same, of the lands lying northwest of the river Ohio; and it shall also be the duty of the surveyor to cause to be surveyed the lands in the said Territories, the claims to which have been or hereafter may be confirmed by any act of Congress, which have not already been surveyed according to law; and generally to do and perform all and singular the duties required by law to be performed by the principal deputy surveyor for the Territory of Missouri; and shall transmit to the registers of the land offices within the said Territories, respectively, general and particular plats of all the lands surveyed, or to be surveyed, and shall also forward copies of said plats to the Commissioner of the General Land Office; fix the compensation of the deputy surveyors, chain carriers, and axemen: *Provided*, That the whole expense of surveying and marking the lines shall not exceed three dollars for every mile that shall be run, surveyed, and marked.

SEC. 2. *And be it further enacted*, That the surveyor of the lands of the United States, appointed in pursuance of this act, shall be allowed an annual compensation of one thousand dollars, and shall be entitled to receive from individuals the following fees: that is to say, for recording the surveys executed by any of the deputies, at the rate of twenty-five cents for every mile of the boundary line of such survey, and for a certified copy of a plat of a survey in his office twenty-five cents, and that all the plats of surveys, and all other papers and documents pertaining or which did pertain to the office of the surveyor general under the Spanish government within the limits of the Territory of Missouri, or to the office of principal deputy surveyor for said territory, or pertaining to the office of surveyor general, or to any office heretofore established or authorized for the purpose of executing or recording surveys of lands within the limits of the Territories of Missouri and Illinois, shall be

delivered to the surveyors of the lands of the United States authorized to be appointed by this act; any plat of survey duly certified by the said surveyor shall be admitted as evidence in any of the courts of the United States or Territories thereof.

SEC. 3. *And be it further enacted*, That so much of the act entitled "An act extending the powers of the surveyor general to the Territory of Louisiana, and for other purposes," passed February twenty-eighth, one thousand eight hundred and six, as provides for the appointment of a principal deputy surveyor, and so much of any act of Congress here[to]fore passed, as is repugnant to, or inconsistent with, any provision of this act, be, and the same is hereby repealed.

ACT OF APRIL 26, 1822.

[3 Stat., p. 668.]

SECTION 1. That the location heretofore made of warrants issued under the act of the seventeenth of February, one thousand, eight hundred and fifteen, entitled, "An act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes," if made in pursuance of the provisions of that act in other respects, shall be perfected into grants in like manner as if they had conformed to the sectional or quarter-sectional lines of the public surveys; and the sales of fractions of the public lands heretofore created by such locations shall be as valid and binding on the United States as if such fractions had been made by rivers or other natural obstructions.

SEC. 2. That hereafter the holders and locators of such warrants shall be bound, in locating them, to conform to the sectional or quarter-sectional lines of the public surveys, as nearly as the respective quantities of the warrants will admit; and all such warrants shall be located within one year after the passage of this act, in default whereof the same shall be null and void.

Act of May 26, 1824.

[4 Stat., p. 39.]

Chap. CLIV.—An act concerning pre-emption rights in the Territory of Arkansas.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person, and the legal representative of every person, who was entitled to the right of pre-emption in the Territory of Arkansas, under the provisions of the act of Congress of the 12th of April, one thousand eight hundred and fourteen, entitled "An act for the final adjustment of land-titles in the State of Louisiana and Territory of Missouri," in that tract of country north of the river Arkansas, ceded by the United States to the Cherokee Nation of Indians, on the eighth day of July, one thousand eight hundred and seventeen, be, and they are hereby, authorized, in lieu thereof, and in full compensation for such right of pre-emption, to enter with the register of the land-office in the district of Lawrence, in said Territory, any tract within said district, on which they may have made improvements previously to the passing of this act, or any unimproved tract within said district, the sale of which is authorized by law: *Provided*, That no more than one-quarter section of land shall be sold to any one individual, in virtue of this act; and the same shall be bounded by the sectional and divisional lines run, or to be run, under the direction of the surveyor of the United States lands for the States of Missouri and Illinois, and Territory of Arkansas.

Sec. 2. *And be it further enacted*, That every person claiming a preference in becoming the purchaser of a tract of land, in virtue of this act, shall deliver a notice in writing to the register of the land office for said district, stating therein that he was entitled to a pre-emption right, under the aforesaid act of Congress, in that part of the Territory of Arkansas ceded as aforesaid, and also particularly designating therein the quarter-section he is desirous to enter, which notice the register shall file in his office; and, in every case where it shall be proved, to the satisfaction of the register and receiver of public moneys of the land-office aforesaid, that any person who has delivered such notice was entitled to a pre-emption right under said act of Congress, in that part of the Territory of Arkansas ceded as aforesaid, shall

have a right to enter with the register of said land office, at the minimum price for which United States lands are sold, the tract of land designated in said notice, on producing his receipt from the receiver of public moneys for the purchase-money of said tract, as in case of other public lands sold at private sale; and, as a compensation for their services, the register and receiver shall each be entitled to one dollar in every such case, to be paid by the claimant of such pre-emption right: *Provided*, That every such entry and payment shall be made at least two weeks previous to the time of offering the adjacent lands at public sale, unless the same be entered in such part of said district as shall have been offered at public sale at the time of the passage of this act; in which case such entry shall be made within two years from the passage thereof.

Act of March 2, 1827.

[4 Stat., p. 219.]

Chap. XXXIV.—An act supplementary to "An act to perfect certain locations and sales of the public lands in Missouri," passed April the twenty-six (sixth), one thousand eight hundred and twenty-two.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the locations of lands heretofore made according to law, by virtue of warrants issued under the act of Congress, passed the seventeenth day of February, one thousand eight hundred (and) fifteen, for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes, in view of lots and out-lots, in and adjacent to the villages of New Madrid and Little Prairie, and not exceeding six hundred and forty acres in the whole to any one sufferer, shall be perfected into grants in the manner prescribed by the last-mentioned act of Congress, any construction thereof to the contrary notwithstanding.

Act of May 29, 1830.

[4 Stat., p. 420.]

Chap. CCVIII.—An act to grant pre-emption rights to settlers on the public lands.

Be it enacted by the Senate and House of Representatives

of the United States of America in Congress assembled, That every settler or occupant of the public lands, prior to the passage of this act, who is now in possession, and cultivated any part thereof in the year one thousand eight hundred and twenty-nine, shall be, and he is hereby, authorized to enter, with the register of the land office, for the district in which such lands may lie, by legal subdivisions, any number of acres, not more than one hundred and sixty, or a quarter section, to include his improvement, upon paying to the United States the then minimum price of said land: *Provided, however*, That no entry or sale of any land shall be made, under the provisions of this act, which shall have been reserved for the use of the United States, or either of the several States, in which any of the public lands may be situated.

SEC. 2. *And be it further enacted*, That if two or more persons be settled on the same quarter section, the same may be divided between the two first actual settlers, if, by a north and south, or east and west line, the settlement or improvement of each can be included in a half quarter section; and in such case the said settlers shall each be entitled to a preemption of eighty acres of land elsewhere in said land district, so as not to interfere with other settlers having a right of preference.

SEC. 3. *And be it further enacted*, That, prior to any entries being made under the privileges given by this act, proof of settlement or improvement shall be made to the satisfaction of the register and receiver of the land district in which such land may lie, agreeably to the rules to be prescribed by the Commissioner of the General Land Office for that purpose, which register and receiver shall each be entitled to receive fifty cents for his services therein. And that all assignments and transfers of the right of pre-emption given by this act, prior to the issuance of patents, shall be null and void.

SEC. 4. *And be it further enacted*, That this act shall not delay the sale of any of the public lands of the United States beyond the time which has been, or may be, appointed for that purpose by the President's proclamation; nor shall any of the provisions of this act be available to any person or persons, who shall fail to make the proof and payment required before the day appointed for the commencement of the sales of lands, including the tract or tracts on which the

right of pre-emption is claimed; nor shall the right of pre-emption, contemplated by this act, extend to any land which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated, for any purpose whatsoever.

SEC. 5. *And be it further enacted*, That this act shall be and remain in force for one year from and after its passage.

ACT RESERVING THE HOT SPRINGS, ETC., APRIL 20, 1832.

[4 Stat., p. 505.]

CHAP. LXX.—An act authorizing the Governor of the Territory of Arkansas to lease the salt springs in said Territory, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the salt springs, lying on the Washita river, on Little river, and on Saline creek, in said Territory of Arkansas, together with as many contiguous sections to each of said springs as shall be equal to one township, and every other salt spring which may be discovered in the said Territory with the section of one mile square which includes it, shall be reserved for the future disposal of the United States, and shall not be liable to be entered, located, or appropriated for any other purpose whatever.

SEC. 2. *And be it further enacted*, That the Governor of said Territory shall be, and is hereby, authorized to let out or lease said springs for a term not exceeding five years; and the rents and profits arising from said springs shall be applied, by the Legislature of said Territory, to the opening and improving such roads in said Territory as said Legislature may direct, and to no other purpose whatever.

SEC. 3. *And be it further enacted*, That the hot springs of said Territory, together with four sections of land, including said springs, as near the centre thereof as may be, shall be reserved for the future disposal of the United States, and shall not be entered, located, or appropriated for any other purpose whatever.

ACT OF JULY 14, 1832.

[4 Stat., p. 603.]

CHAP. CCXLVI.—An act supplemental to the act "granting the right of pre-emption to settlers on the public lands," approved the twenty-ninth day of May, eighteen hundred and thirty. (a.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the occupants and settlers upon the public lands of the United States, who are entitled to a pre-emption according to the provisions of the act of Congress approved the twenty-ninth day of May, eighteen hundred and thirty, and who have not been, or shall not be, enabled to make proof and enter the same within the time limited in said act, in consequence of the public surveys not having been made and returned, or where the land was not attached to any land district, or where the same has been reserved from sale on account of a disputed boundary between any State and Territory, the said occupants shall be permitted to enter the said lands on the same conditions, in every respect, as are prescribed in said act, within one year after the surveys are made or the land attached to a land district or the boundary line established; and, if the said lands shall be proclaimed for sale before the expiration of one year as aforesaid, then they shall be entered before the sale thereof.

SEC. 2. *And be it further enacted*, That the occupants upon fractions shall be permitted, in like manner, to enter the same, so as not to exceed in quantity one quarter section, and if the fractions exceed a quarter section, the occupant shall be permitted to enter one hundred and sixty acres, to include his or their improvement, at the price aforesaid.

ACT OF JUNE 19, 1834.

[4 Stat., p. 678.]

CHAP. LIV.—An act to revive an act entitled, "An act to grant pre-emption rights to settlers on the public lands," approved May twenty-nine, one thousand eight hundred and thirty. (a.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every settler or occupant of the public lands, prior to the passage of this act, who is now in possession, and cultivated any

part thereof, in the year one thousand eight hundred and thirty-three, shall be entitled to all the benefits and privileges provided by the act entitled "An act to grant pre-emption rights to settlers on the public lands," approved May twenty-nine, one thousand eight hundred and thirty; and the said act is hereby revived and shall continue in force two years from the passage of this act and no longer.

SEC. 2. *And be it further enacted*, That where a person inhabits one quarter-section and cultivates another, he shall be permitted to enter the one or the other at his discretion: *Provided*, Such occupant shall designate, within six months from the passage of this act, the quarter-section of which claims the pre-emption under the same.

SEC. 3. *And be it further enacted*, That all persons residing on the public lands, and cultivating the same prior to the year eighteen hundred and twenty-nine, and who were deprived of the advantages of the law passed on the twenty-ninth May, eighteen hundred and thirty, by the constructions placed on said law by the Secretary of the Treasury be, and they are hereby, authorized to enter, at the minimum price of the Government, one quarter-section of the public lands within said land-district.

ACT OF JUNE 22, 1838.

[5 Stat., p. 251.]

CHAP. CXIX.—An act to grant pre-emption rights to settlers on the public lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every actual settler of the public lands, being the head of a family, or over twenty-one years of age, who was in possession and a housekeeper, by personal residence thereon, at the time of the passage of this act, and for four months next preceding, shall be entitled to all the benefits and privileges of an act entitled "An act to grant pre-emption rights to settlers on the public lands," approved May twenty-nine, eighteen hundred and thirty, and the said act is hereby revived and continued in force two years: *Provided*, That where more than one person may have settled upon and cultivated any one quarter-section of land, each one of them shall have an equal

share or interest in the said quarter-section, but shall have no claim, by virtue of this act, to any other land.

* * * * * *

That before any person claiming the benefit of this law shall have a patent for the land which he may claim by having complied with its provisions, he shall make oath, before some person authorized by law to administer the same, which oath, with the certificate of the person administering it, shall be filed with the register of the proper land office when the land is applied for, and by said register sent to the office of the Commissioner of Public Lands, that he entered upon the land which he claims, in his own right, and exclusively for his own use and benefit, and that he has not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whatever, by which the title which he might acquire from the Government of the United States should inure to the use or benefit of any one, except himself, or to convey or transfer the said land, or the title which he may acquire to the same, to any other person or persons whatever, at any subsequent time; and if such person, claiming the benefit of this law as aforesaid, shall swear falsely in the premises, he shall be subject to all the pains and penalties for perjury, forfeit the money which he may have paid for the land, and all right and title to the said land, and any grant or conveyance which he may have made in pursuance of such agreement or contract, as aforesaid, shall be void, except in the hands of a purchaser in good faith, for a valuable consideration without notice.

Act of March 1, 1843.

[5 Stat., 603.]

Chap. L.—An act to perfect the titles to lands south of the Arkansas River, held under New Madrid locations and pre-emption rights, under the act of one thousand eight hundred and fourteen [fifteen.] [*a.*]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the locations heretofore made of warrants issued under the act of the seventeenth of February, one thousand eight hundred and fifteen, entitled "An act for the relief of the in-

habitants of the late county of New Madrid, in Missouri territory, who suffered by earthquakes," of those locations which were made on the south side of the Arkansas river, if made in pursuance of the provisions of that act in other respects, shall be perfected into grants in like manner as if the Indian title to the lands on the south side of said river had been completely extinguished at the time of the passage of said act.

SEC. 2. *And be it further enacted*, That in all cases in which the locations so made on the south side of the Arkansas river may have been sold, and the lands thus located under the act aforesaid have been appropriated by the United States, the owner of the warrants issued under the provisions of the act aforesaid shall have a right to enter, within twelve months after the passage of this act, without payment, the like quantity of the public lands of any of the unappropriated and unimproved lands in the State of Arkansas, corresponding with the legal subdivisions.

SEC. 3. *And be it further enacted*, That every settler on the public lands south of the Arkansas river shall be entitled to the same benefits accruing under the provisions of the preemption act of one thousand eight hundred and fourteen [fifteen,] as though they had resided north of said river.

SEC. 4. *And be it further enacted*, That all Cherokee preemptions which have been or may be located upon any of the surveyed lands of the United States south of the base line in Arkansas, shall be confirmed, and patents shall issue thereon as in other cases.